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IN THE

Supreme Court of the United States

OCTOBER TERM, 1963.

No. 800

SUBURBAN TELEPHONE COMPANY, A CORPORATION,
Appellant,

vs.

THE MOUNTAIN STATES TELEPHONE AND TELEGRAPH COMPANY, A CORPORATION, ET AL.,
Appellees.

ON APPEAL FROM THE SUPREME COURT OF NEW MEXICO.

JURISDICTIONAL STATEMENT.

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Danielian, A. T. & T., The Story of Industrial Conquest (Vanguard Press, 1939) 18

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JURISDICTIONAL STATEMENT.

OPINION BELOW.

The opinion of the Supreme Court of New Mexico, reported in 72 N. M. 411, 384 P. 2d 684, is printed and annexed hereto as Appendix A, *infra*, and a copy of the judgment is annexed as Appendix B, *infra*. The order denying rehearing is annexed as Appendix C, *infra*.

JURISDICTION.

The judgment and opinion of the Supreme Court of New Mexico were entered on June 24, 1963 (Appendices A and B; R. 1372, 1384; 72 N. M. 411, 384 P. 2d 684). On September 9, 1963, the Supreme Court of New Mexico denied rehearing (Appendix C; R. 1469). Notice of appeal to this

Court was filed in the Supreme Court of New Mexico on December 5, 1963 (R. 1482). The jurisdiction of this Court to review on appeal a final order and judgment rendered by the highest court of a State in which a decision could be had "where is drawn in question the validity of a statute of any state on the ground of its being repugnant to the Constitution * * * of the United States, and the decision is in favor of its validity," is conferred by 28 U. S. C. 1257(2).

STATUTES INVOLVED.

The New Mexico Statutes Annotated, 1953, §§ 69-8-1 through 69-8-3, provide as follows:

"69-8-1. Duplication of Certain Public Utilities Prohibited.

"It shall hereafter be unlawful to construct, own, operate, manage, lease or control any plant or equipment for the furnishing of any public utility service contemplated by article XI, section 7, of the Constitution of the state of New Mexico, in the same municipality, field or territory where there is in operation any such plant or equipment engaged in a similar service unless public convenience and necessity shall require such second plant or equipment.

"69-8-2. Determination of Convenience and Necessity Upon Petition.

"Such question of public convenience and necessity shall be determined upon petition and hearing in the district court of the county wherein the proposed second plant or equipment is to be operated. Any interested person, corporation, municipal corporation, partnership or association, proposing to construct or operate such second plant or equipment, shall first file a petition in said district court, to which petition the authority proposing to authorize the construction of such second plant or equipment and the owner, manager or operator of the plant and equipment then in operation shall be made parties. The petition shall set up the

reasons why public convenience and necessity require such second plant or equipment. If the judgment of the court upon said hearing shall be that public convenience and necessity do not require the proposed second plant or equipment, the petition shall be dismissed at the cost of the petitioners; but if the court shall find that public convenience and necessity require that additional plant or equipment is necessary, then it shall issue an order in the alternative directing the owner, manager or operator of the plant and equipment then in operation to make such changes and additions in plant as may be necessary to meet the public convenience and necessity within ninety (90) days, or such other additional time as the court may set, and if such changes or additions are not made within the time ordered by the court, then a certificate of public convenience and necessity for such second plant and equipment may issue.

"69-8-3. Injunction When Issued.

"When it shall appear that any second plant or equipment, as above described, is about to be authorized or constructed contrary to the terms of this act (69-8-1 to 69-8-6), or that any municipal corporation is attempting to construct, own, operate, manage or control any second plant or equipment contrary to the terms of this act, the owner or owners, operator or operators, manager or managers, lessee or lessees of any plant or equipment then in operation in said municipality, field or territory and engaged in a similar service, may apply to the district court of the county in which said authorization, construction or operation is threatened for a restraining order and injunction against the construction, owning, operation, management, leasing or control of such second plant or equipment, and the court shall make such restraining order and injunction perpetual unless it be established at the hearing before said court that public convenience and necessity require such second plant and equipment, in which case the court shall grant the alternative order as specified in section 2(69-8-2) hereof."

The New Mexico Statutes Annotated, 1953, § 68-1-3, provide as follows:

> "The county commissioners of the several counties are hereby authorized to permit such [public utility] corporation to use the public highways and the streets and alleys of unincorporated towns for their pipes, poles, wires, cables, conduits, towers, transformer stations and other fixtures, appliances and structures: Provided, that such use shall not unnecessarily obstruct public travel and such county commissioners and municipal authorities of incorporated cities and towns are hereby authorized to grant franchises not exceeding twenty-five years (25) duration to corporations for such purposes within their respective jurisdictions."

QUESTIONS PRESENTED.

1. The decision and judgment of the Supreme Court of New Mexico in this action and Sections 69-8-1 through 69-8-3 and 68-1-3 New Mexico Statutes Annotated, 1953, as interpreted in this decision violate Section 10 of Article I of the Constitution of the United States in that the decision and statute so interpreted impair the obligation of contract and take the appellant's property without compensation.

2. The decision and judgment of the Supreme Court of New Mexico in this action and Sections 69-8-1 through 69-8-3 and 68-1-3, New Mexico Statutes Annotated, 1953, as interpreted in this decision violate the 14th Amendment of the Constitution of the United States by denying due process of law and equal protection of the laws in that (1) the decision and statutes so interpreted are an arbitrary and capricious exercise of police power in regulation of private parties and public utilities, and (2) the statute is so vague and indefinite that the public and private parties are uninformed and unable to rely on their meanings and they are incapable of proper judicial interpretation and application.

3. The decision and statutes so interpreted take and destroy the property of the appellant.

STATEMENT.

In this case, an operating company of the Bell Telephone System persuaded the Supreme Court of New Mexico to confiscate the $100,000 investment of a small independent telephone company attempting to provide the first telephone service to some 70 individual users in the unincorporated town of Quemado, New Mexico.

The appellant, Suburban Telephone Co., was incorporated in New Mexico on September 2[illegible], 1960, and immediately began operating the Zuni Telephone System, purchased from the U. S. Bureau of Indian Affairs on September 6, 1960 (R. 623, 1055-6, 1073, 1093). The value of this system and subsequent additions is about $100,000 (R. 1037). The Zuni System consisted of a 10-line central exchange switchboard located at Black Rock, 75 miles north of Quemado, and with lines extending north to Gallup, east to El Morro National Monument and west to Zuni Pueblo and Ojo Caliente (R. 629, 1074). All of these points were located in Valencia County, directly north of Catron County, and in McKinley County, directly north of Valencia County (See map annexed hereto as Appendix D, *infra*).

On December 19, 1960, the appellant purchased from Rocky Mountain Salt Company, a private telephone line 20½ miles long between Salt Lake and Quemado, both located in Catron County, the appellant contracting to "exercise its best efforts to create telephone connection with other companies furnishing long distance service as promptly as possible" (R. 260, 91-2).

By December, 1960, the appellant had constructed a new central exchange building at Black Rock where it installed a 100-line central exchange switchboard, and in January,

1961, had completed a new building for terminating equipment at Gallup, where it connected with the Mountain States Telephone and Telegraph Company exchange for long distance switching service (R. 630-31).

On January 3, 1961, the appellant obtained a County Franchise from the County Commissioners of Catron County pursuant to N. M. S. A. 1953 § 68-1-2 and 68-1-3 and accepted such franchise on March 18, 1961 (R. 261-4, 265).

In February, 1961, the appellant commenced construction of a new telephone line from Black Rock south to Fence Lake, a distance of about 33 miles, or about one-half way to Quemado, and an exchange building with a carrier system at Fence Lake (R. 193, 632). Fence Lake is in Valencia County a few miles from the northern boundary of Catron County and had never had any type of telephone service prior to that introduced by the appellant (R. 193, 632).

By April, 1961, the appellant was operating its new 3-circuit system (in lieu of the Zuni System's 1-circuit) between Black Rock and Gallup and in May was operating 2 circuits between Fence Lake and Black Rock (R. 631).

About May 1, 1961, the appellant commenced construction of a telephone line from Fence Lake south to connect with the Salt Lake line, purchased in December, 1960; on May 25, 1961 completed a telephone circuit from Gallup to Quemado; and on May 29, 1961, the first long distance calls were made to and from Quemado which had theretofore had no telephone service of any kind (R. 92, 194, 790).

In June, 1961, the appellant installed a switchboard in Quemado with three circuits available to Gallup for long distance service and one circuit was in operation prior to the present litigation (R. 196).

On June 6, 1961, the appellant transmitted its rates for the Quemado area to the New Mexico Corporation Commission for filing and on July 1, 1961, after minor changes,

were filed with and accepted by the Commission (R. 195, 268).

The appellant by letters of June 7 and June 14, 1961 requested Mountain States Telephone and Telegraph Company to connect at Gallup the 3 circuits from Quemado, but Mountain States refused to do so, although open connections were available (R. 271, 625-8, 985, 1047).

On June 8, 1961, the appellant filed with Mountain States at Gallup its telephone numbers for the Quemado subscribers (R. 272). Mountain States refused to accept these numbers and refused to acknowledge on their records that any telephone numbers or subscribers existed in the Town of Quemado and refused to recognize that Quemado was a rate center (R. 299, 625-6, 682, 695-6, 704-6, 712-13). When a person in Albuquerque attempted to call a person in Quemado and asked the long distance operator for information or numbers on Quemado, the long distance operator would advise that there was no such listing. Likewise when a person in Quemado sought to call out through the Mountain States' operator in Gallup, the Mountain States' operator would continually seek to discourage the Quemado subscriber from making any long distance calls. When a Quemado subscriber made a long distance call, Mountain States would toll ticket it and bill the call as if it were coming from Black Rock in New Mexico and not Quemado, New Mexico. Mountain States refused to file the rates and charges for long distance calls from Quemado with the Federal Communications Commission as required by Section 203(a) of the Federal Communications Act of 1934 as amended (47 U.S.C. § 203).

The appellant has a contract with Mountain States dated March 21, 1961, providing for line haul settlements as follows (R. 273, 289, 291, 439):

No. of Circuits In Use In Group	Average Cost Factor Per Route Mile Per Month
1	$ 5.00
2	8.25
3	11.25
4	14.00
5	16.75

This is a payment covering the usage by Mountain States of Suburban's telephone circuits; for example, if Mountain States, in accordance with appellant's request for connection of appellant's three circuits to Quemado from Gallup, furnished connections at its Gallup office for those three circuits, it would pay to appellant, under the contract, line haul at $11.25 per month per mile for 110 miles, or $1,237.50 per month, or $14,850.00 per year. If appellant were to use five circuits from Gallup to Quemado, the rate would be $16.75 per month per mile, or $1,842.50 per month or $22,110.00 a year (R. 795-6). It is this required payment under the contract which permits an independent telephone company to furnish efficient telephone service in sparsely settled rural communities such as those in and around Quemado.

On July 25, 1961, Mountain States Telephone and Telegraph Company filed a complaint in the district court of New Mexico to enjoin the appellant from operating in the "Town of Quemado and surrounding rural area" (R. 1, 4) and the appellant filed a counterclaim to enjoin Mountain States from operating within the appellant's field or territory (R. 17).

Mountain States Telephone and Telegraph Company (hereafter called "Mountain States") is one of the operating companies owned by American Telephone and Telegraph Company and is the part of the "Bell System" fur-

nishing telephone service in the States of Arizona, Colorado, Idaho, Montana, New Mexico, Utah and Wyoming (R. 330).

Beginning about 1950, the residents of northern Catron County had made repeated requests to Mountain States to furnish telephone service in the Datil, Pie Town and Quemado areas by extending service from its switchboard in Magdalena, located in Socorro County directly east of Catron County, and about 80 miles east of Quemado, but Mountain States refused these requests (R. 331-2, 701-3).

In 1953, some 9 to 12 ranchers in and around Datil, in Catron County about 40 miles west of Magdalena and about 40 miles east of Quemado, formed the Datil Telephone Cooperative and built a telephone pole line with two physical wires to Magdalena (R. 332, 369, 530). All of the equipment for the telephone service was owned, maintained and operated by the cooperative, except that some 12 home telephone instruments were rented by the cooperative from Mountain States (R. 559-60). The cooperative contracted with Mountain States to switch their dial calls at Magdalena and to give them operator service out of Socorro because there were no operators at Magdalena (R. 370). The ranchers constructed, serviced and maintained this line (R. 369-70, 559-60).

There were continued repeated requests by residents of Fence Lake, Quemado and Pie Town for telephone service without response from Mountain States. A general meeting was held with some of these people in October, 1959, and the inference made that Mountain States would extend its plant (R. 333, 336, 554-5, 557). Mountain States exerted just enough effort to discourage competition but not enough effort to provide service to the people of Catron County from 1950 to 1961.

On April 18, 1960, a resident of Quemado had complained by letter to the New Mexico Corporation Commission regarding the lack of any telephone service in the Town of Quemado (R. 959). On April 21, 1960, the Corporation Commission wrote a letter to Mountain States inquiring as to the possibility of its going into Quemado (R. 961). Mountain States on June 13, 1960 wrote to the Corporation Commission stating in part (R. 250, 961): "The provision of service in the Quemado Community has been understudied for some time. Up to this time, due to the very high costs involved, it has not been possible for us to program this project."

Mountain States had made some surveys and studies of the Datil and Quemado area which were incorporated in an internal report as a proposed project and dated June 23, 1960 (R. 251). This internal report indicated that Mountain States proposed five trunk circuits for the Town of Quemado and three for the Town of Datil (R. 252). This report was transmitted by the Albuquerque office of Mountain States to the home office at Denver, and was not approved by the Denver office until March 20, 1961 (R. 259). There was no construction in the Datil area or in Catron County by Mountain States *until after June 1, 1961* (R. 353, 354, 545).

On May 29, 1961 Mountain States obtained a Bill of Sale from the owners of the Datil Cooperative under which the Datil Cooperative subscribers transferred to Mountain States the line from Magdalena to Datil and the local subscribers' lines in and around Datil. Mountain States paid $9,400 to the Datil Cooperative for the Cooperative's "telephone pole lines, wire, equipment and facilities" (R. 932-3).

Sometime after June 1, 1961, Mountain States took physical control of the Cooperative's line and commenced improvements including the construction of an exchange building at Datil and the installation of a switchboard therein. The Mountain States' Datil exchange was cut-over and in operation on or about July 23, 1961 (R. 93, 404), almost two months after the appellant had provided service at Quemado. Two days later, Mountain States commenced this litigation.

After the filing of the complaint and commencing about August, 1961, appellant acquired land in Quemado, built an exchange building in Quemado, installed a 100-line switchboard, replacing the former 10-line board, and constructed a complete cable plant within the town of Quemado for local service (R. 216-19, 668, 743). At the time of the hearing on December 13, 1961, this plant was ready to cut into service (R. 668, 763, 784, 786). Also commencing in August of 1961, the buried cable portion of the line between Fence Lake and Quemado was put on poles because of sabotage (R. 216, 743, 875-7).

Mountain States' chief operator at Gallup, the person with the best personal knowledge, testified on direct examination, that the transmission qualities of appellant's Quemado-Gallup circuit were good. Her testimony was as follows (R. 894):

> "Q. How has the Quemado line been for transmission since 15th of August, 1961?
>
> "A. I would say we have been able to hear them very well.
>
> "Q. Is the transmission on that line as good as on the ordinary Mountain States' toll circuit?
>
> "A. Yes, sir."

As to the adequacy of the appellant's service, see also R. 611-15, 619-20, 680-1, 684-5, 694-5, 698, 727, 787, 1048, 1056.

The trial court entered judgment on March 28, 1962 and found that the appellant was the first telephone company in Quemado with exchange service, but that the service was inadequate and that Suburban would have 90 days to furnish adequate and acceptable service to Quemado (R. 95, 127). The appellant took an appeal to the Supreme Court of New Mexico because the judgment failed to indicate in what respects the appellant's service was deemed inadequate and failed to advise the appellant what additions to plant and equipment the appellant would have to make in order to make the telephone service adequate and acceptable (R. 116). Mountain States also filed a notice of appeal (R. 118).

On June 24, 1963, the Supreme Court of New Mexico entered its judgment to the effect that Mountain States was the first entrant into the North Catron County field or territory (R. 1372).

THE QUESTIONS ARE SUBSTANTIAL.

I.

Competitive free enterprise is an ideal of national and state policy. The antitrust laws forbid the raising of barriers to entry into business. *United States* v. *Aluminum Co. of America*, 148 F. 2d 416 (2d Cir., 1945) at 427-36; *Associated Press* v. *United States*, 326 U. S. 1 (1945). Public utilities are freed from the proscriptions of antitrust laws to the extent they are regulated. Hale and Hale, "Competition or Control," 106 U. of Pa. L. Rev. 641 (1958) and 110 U. of Pa. L. Rev. 57 (1961). Monopolies must be controlled either by private competition or by public regulation. Restraints upon competition must be prevented or regulated.

In the field of communications, the need for and the results of competition have been stated as follows by the

Federal Communications Commission (*F. C. C. v. RCA Communications, Inc.*, 346 U. S. 86 (1953) at 94, footnote 6):

> "Competition can generally be expected to provide a powerful incentive for the rendition of better service at lower cost. Those seeking the patronage of customers are spurred on to install the latest developments in the art in order to improve their services or products, and in order to enable them to reduce expenses and thereby lower their rates or prices. The benefits to be derived from competition should, therefore, not be lightly discarded."

In enacting the Federal Communications Act, Congress declared its purpose "to make available, so far as possible, to all the people of the United States a rapid, efficient, nation-wide, and world-wide wire and radio communication service with adequate facilities at reasonable charges, for the purpose of the national defense, for the purpose of promoting safety of life and property through the use of wire and radio communication . . ." 47 U. S. C. § 151.

Section 314 of the Communications Act forbids radio licensees or their affiliates to acquire control of wire telegraph or telephone lines, and vice versa, if "the purpose is and/or the effect thereof may be to substantially lessen competition or to restrain commerce." 47 U. S. C. § 314. In *Federal Communications Commission* v. *RCA Communications, Inc.*, 346 U. S. 86 (1953), this Court said in its opinion at page 94:

> "There can be no doubt that competition is a relevant factor in weighing the public interest. Cf. *McLean Trucking Co.* v. *United States*, 321 U. S. 67, 86-88."

Congressional policy toward telephone service has also been made clear. The Rural Electrification Act of 1936 was amended in 1949 by the Rural Telephone Act, which provided (7 U. S. C. § 921):

> "It is declared to be the policy of the Congress that adequate telephone service be made generally available in rural areas through the improvement and expansion of existing telephone facilities and the construction and operation of such additional facilities as are required to assure the availability of adequate telephone service to the widest practicable number of rural users of such service."

After a detailed study, "Legal Restriction of Competition in the Regulated Industries: An Abdication of Judicial Responsibility," 67 Harv. L. Rev. 436 (1954), Professor Schwartz concluded at page 475:

> ". . . a possible starting point with respect to the role of competition in the regulated industries would be the proposition that free enterprise ought to prevail to the maximum extent consistent with the technical or other defined objectives of the applicable legislation . . . justification [of non-competitive practices] would require a showing that curtailment of competition was necessary in order to achieve some paramount objective of administrative regulation."

In many states telephone companies have been held to be subject to antitrust statutes. *United States Tel. Co.* v. *Central Union Tel. Co.*, 171 Fed. 130 (N. D. Ohio, 1909), aff'd, 202 Fed. 66 (6th Cir., 1913); *Union Trust & Sav. Bank* v. *Kinloch Tel. Co.*, 258 Ill 202, 101 N. E. 535 (1913); *Louisville Home Tel. Co.* v. *Averill*, 199 N. Y. 128, 92 N. E. 206 (1910).

The public policy of New Mexico is expressed in its statute which makes contracts in restraint of trade illegal (N. M. S. A. 1953, § 49-1-1), and subject to penalty (§ 49-1-2) and providing that (§ 49-1-3):

> "All contracts and agreements in violation of the foregoing two sections shall be void, and the person or persons, corporation or corporations, association or associations who shall violate the provisions of either of said sections shall be civilly liable to the party

injured for any and all damage occasioned by such violation . . ."

Significantly, § 49-1-4 lists organizations exempt from the antimonopoly statute and does not include public utilities of any kind.

The American Telephone and Telegraph Company is the largest corporate combination of assets in the world and the greatest private aggregation of economic wealth ever known to man: its assets exceed $26 billion (almost 3 times greater than those of General Motors Corporation, the largest industrial corporation in the world); its annual gross revenue exceeds $9 billion; and its annual net income is almost $1.5 billion (*Fortune*, July and August, 1963, Corporate Directories; *Time*, November 29, 1963, pages 89-90). American Telephone and Telegraph Company owns 21 operating companies comprising the Bell System (Page, *The Bell Telephone System* (1941) at 210-12) and owns Western Electric Company, the manufacturer of Bell equipment and the 9th largest industrial corporation in the United States (*Fortune*, July, 1963, at 178).

Horace Coon in his book, *American Tel & Tel, The Story of a Great Monopoly* (Longmans, Green and Co., 1939) relates at pages 81, 90, 91 and 92:

> "Never once in its entire history . . . has the Bell System been threatened by serious competition . . .
>
> "[In the beginning the Bell System dealt with competition] by perpetuating its patent monoply and by rapid expansion of its facilities . . .
>
> "Meanwhile the Bell System fought competition in other ways. An active campaign of propaganda was directed at undermining independent interests with the public, with bankers, with legislatures, and with investors. More effective was the refusal of the System to connect with independent systems. Almost as effective was the refusal to sell telephone equipment to non-Bell companies . . .

"Independents in many places compelled Bell companies to reduce their rates and to give better service."

Throughout its history "the Bell interests had preempted the wealthiest and most populous sections of the country" and "had obtained the franchises and established service in the big cities" whereas the independent companies furnished the needed services in rural and non-populous areas where the financial return was meager (Coon, *American Tel & Tel* (1939) at 81).

The percentage of the number of telephones in the United States owned by the Bell System and the percentage owned by independent telephone companies through the years have shown an inexorable process toward a complete Bell monopoly:

	Independent	Bell System
1907	49%	51%
1935	17%	83%
1963	16%	84%

The independent telephone companies own about 12% of the assets invested in telephone communications and earn about 10% of the gross revenue from telephone operations. While there were 20,000 independent telephone companies in existence in 1900, the number has continuously decreased and is still doing so:

1900	20,000
1950	5,500
1961	3,200
1962	2,950
1963	2,600

(Coon, *American Tel & Tel* (1939) at 109; *Wisconsin Telephone Co.*, 27 F. C. C. Rep. 1 (1959) at 13; *Business Week*, August 20, 1960 at 54; Britannica Year Books (1962) at 667 and (1963) at 782; *Business Week*, November 30, 1963 at 104).

There are 331,400 telephones in New Mexico, of which 286,800 or 86½% are owned by Mountain States Telephone and Telegraph Company and 44,600 or 13½% are owned by some 20 to 25 various independent companies of which the appellant is one (Telephony's *Directory of the Telephone Industry*).

In an intra-company memorandum in the present case reporting upon the proposed Datil and Quemado project, dated June 23, 1960, Mountain States wrote (R. 251):

> "Although cost studies indicate that such a project might not be financially attractive, it is to our best interest for the following reasons:
>
> * * * * *
>
> "(3) Any Independent Company operation in this area would be a detriment to our company due to line haul settlements to Magdalena over a period of years . . ."

Despite these facts, the United States has instituted only two cases against the American Telephone and Telegraph Company under the antitrust laws. The first case was filed on July 24, 1913 under the Sherman Act and alleged that A.T.&T. through its subsidiaries had acquired a monopoly of the telephone business on the Pacific Coast by means of exclusive contracts and other means. A consent decree was entered on March 26, 1914 (1 Decrees & Judgments in Federal Antitrust Cases). In 1949, the second case was filed against A.T. & T. and its subsidiaries including Western Electric Company. A consent decree was entered on January 24, 1956, requiring the defendants to grant non-exclusive patent licenses and to take other steps to protect competition. *United States* v. *Western Electric Co.*, CCH Trade Reg. Rep. (1956 Trade Cases) ¶ 68,246 (D. C., N. J., 1956).

The only other challenge to A.T. & T. was commenced when Congress by joint resolution in 1935 authorized the

Federal Communications Commission to investigate the Bell System. Public Res. No. 8, 74th Cong., 1st Sess., 49 Stat. 43, approved March 15, 1935. On June 14, 1939, the F.C.C. issued its Report on Telephone Investigation which included the following (quoted in Coon, *American Tel & Tel* (1939) at pages 250-1):

> "It has become obvious that the experience, expertness, and continuity of management attained by the American telephone industry must be matched to the highest practicable degree by equivalent experience, expertness, and continuity of supervision on the part of the representatives of the public if the regulatory process is to become even measurably successful . . . So long as the Bell System continues to be organized upon its present basis the individual states must continue to look to the federal regulatory agency to afford them with the many elements of the essential factual background of telephone regulation . . . Only through such a program may the public authorities of both the nation and the states be enabled to cope with this complex situation."

See Hearings Before House Appropriations Subcommittee on Independent Offices Appropriation Bill, 76th Cong., 1st Sess. (1939) 1496-7; Comment, "Direct Regulation of the American Telephone & Telegraph Company," 48 Yale L. J. 1015 (1939); Wheat, "Regulation of Interstate Telephone Rates," 51 Harv. L. Rev. 846 (1938); Danielian, *A.T.&T., The Story of Industrial Conquest* (Vanguard Press, 1939).

The action of the state courts in this case restrained competition between the appellant and Mountain States, perpetuated the monopoly enjoyed by Mountain States, and confiscated the property of the appellant without due process of law in a situation not subject to the regulatory control or supervision of any expert administrative body. The appellant's property which was employed in furnishing the public utility telephone service involved here and

which was confiscated by the state courts' action, as well as the telephone service proposed to be furnished by Mountain States, is located wholly within the State of New Mexico. The *Federal Communications Commission* regulates interstate and foreign commerce in wire and radio communication in accordance with the provisions of the Federal Communications Act of 1934 (47 U. S. C. §151 ff.) but has no supervisory authority over the intrastate operations involved in this case.

The New Mexico structure of public utility regulation provides:

1. The *Public Service Commission*, created by statute (N. M. S. A. 1953, § 68-4-1 ff.) regulates the rates, securities and services, including the issuance of certificates of public convenience and necessity for new service (§68-7-1), of *electricity, gas, water and steam utilities* (§68-3-2) in accordance with the provisions of the Public Utility Act (§68-3-1 ff).

2. The *State Corporation Commission*, created by the Constitution (Art. XI, sec. 1) regulates the *rates only* of railway, express, telegraph, *telephone*, sleeping-car and other transportation and transmission *companies* and common carriers (Art. XI, sec. 7).

3. There is no regulation or supervision *by any administrative agency over the services of a telephone company.*

4. There is no requirement that a certificate of public convenience and necessity be issued for new service by a telephone company, except when *competing or duplicating services* are sought to be furnished in the same municipality, field or territory where there is in operation plant or equipment engaged in a similar public utility service (N. M. S. A. 1953, § 69-8-1), whereupon the *state district*

court of the county wherein the proposed second plant or equipment is to be operated

a. May, upon the petition of the proposed operator of the second plant or equipment, if the court shall find that public convenience and necessity require that additional plant or equipment is necessary, issue an order in the alternative

(1) Directing the operator of the plant and equipment then in operation to make such changes and additions in plant as may be necessary to meet the public convenience and necessity within 90 or more days and if such changes and additions are not made within the ordered time, then

(2) A certificate of public convenience and necessity for such second plant and equipment may issue (§69-8-2); or the state district court

b. May, upon the application of the owner or operator of the plant or equipment then in operation, unless it is established at the hearing before the court that public convenience and necessity require such second plant and equipment, perpetually enjoin the operation of the second plant or equipment (§69-8-3).

The action of the Supreme Court of New Mexico in this case does not satisfy the requirements of §§69-8-1 through 69-8-3, and these statutes as construed by that court are unconstitutional. The New Mexico court has unconstitutionally aided and abetted another monopolistic conquest by the Bell System.

II.

A state may not take, destroy or confiscate private property in the guise of public regulation without just compensation or without due process of law. *Stone* v. *Farmers' Loan & Trust Co.*, 116 U. S. 307 (1886); *Dow* v.

Beidelman, 125 U. S. 680 (1888); *Georgia R. & Banking Co.* v. *Smith*, 128 U. S. 174 (1888); *Chicago, M. & St. P. R. Co.* v. *Minnesota*, 134 U. S. 418 (1890); *Reagan* v *Farmers' Loan & Trust Co.*, 154 U. S. 362 (1894); *St. Louis & San Francisco R. Co.* v. *Gill*, 156 U. S. 649 (1895); *Smyth* v. *Ames*, 169 U. S. 466 (1898); *Chicago, M. & St. P. R. Co.* v. *Wisconsin*, 238 U. S. 491 (1915). Specifically, the Supreme Court will under the Fourteenth Amendment reverse the action of a state court resulting in the confiscation of the property of a telephone company. *Home Telephone & Telegraph Co.* v. *Los Angeles*, 227 U. S. 278 (1913); *Southwestern Bell Telephone Company* v. *Public Service Commission of Missouri*, 262 U. S. 276 (1923). Whenever the power of regulation is exerted in an arbitrary and unreasonable manner, it is void because repugnant to the due process and equal protection clauses of the Fourteenth Amendment. *Atlantic Coast Line* v. *North Carolina Corporation Commission*, 206 U. S. 1, 20 (1907). Confiscation may result from a taking of the use of property without compensation quite as well as from the taking of title. *Chicago Rock Island & Pacific Railway Co.* v. *United States*, 284 U. S. 80, 96-7 (1931).

The decision of the Supreme Court of New Mexico in the present case has resulted in an unconstitutional construction and interpretation of N. M. S. A., 1953, §§69-8-1 through 69-8-3 and §68-1-3, in clear violation of the Fourteenth Amendment in that the state may not exercise its police power in such an arbitrary and capricious manner, without an administrative or other finding relating to "public convenience and necessity," when such exercise effectively takes property without compensation, impairs the right of contract, denies equal protection and due process of law.

N. M. S. A., 1953, § 69-8-1, provides:

"It shall hereafter be unlawful to construct, own, op-

> erate, manage, lease or control any plant or equipment for the furnishing of any public utility service contemplated by article XI, section 7, of the Constitution of the state of New Mexico, in the same municipality, field or territory where there is in operation any such plant or equipment engaged in a similar service unless public convenience and necessity shall require such second plant or equipment."

The action of the New Mexico Supreme Court was arbitrary, capricious, unreasonable and discriminatory in the following ways:

1. *The "field or territory" involved*: It is an elementary principle of both public utility law and constitutional law, as well as the statutory mandate of N. M. S. A., 1953, §69-8-1, that the first or existing public utility in the "field" is entitled to protection from a second utility taking or destroying the prior entrant's property (1) unless the public convenience and necessity require additional service and (2) unless the prior entrant is unable to furnish such additional service. 3 Blackstone, Commentaries *219; *Schwartz* v. *Illinois Commerce Commission*, 409 Ill. 182 (1951).

The New Mexico Supreme Court reached its decision destroying the appellant's business and perpetuating the monopolistic business of Mountain States although by every possible criterion, discussed hereafter, the appellant was the first entrant in the field and was ready, willing and able to furnish any additional service found to be reasonably necessary. In reaching its decision, the Court was required to reach an entire series of clearly erroneous and arbitrary conclusions, the first of which was the definition of the "field or territory."

Both the district court and the Supreme Court held (R. 92, 1381) that approximately the northern one-third of Catron County, which is traversed by U. S. Highway 60,

constituted a "field or territory" under the New Mexico statute (N. M. S. A. 1953, §69-8-1). Catron County abuts the State of Arizona in the central portion of the western boundary of New Mexico. It is the largest county in the state with 6,898 square miles but with a population of only 2,773 or 4/10 person per square mile. The county is mountainous and the principal occupations of the inhabitants are stock raising and mining (R. 1376). The northern one-third of Catron County constitutes an area approximately 75 miles from east to west and 30 miles from north to south with almost 2,300 square miles, which is larger in area than the States of Rhode Island (1,214 square miles) or Delaware (2,057 square miles). This large area, which both the state courts held to be *single field or territory* is *divided* from north to south by one of the most imposing barriers in the world—the continental divide. The eastern one-third of this area is part of the Atlantic Ocean watershed and the western two-thirds are part of the Pacific Ocean watershed. Britannica World Atlas (1963), Plate 19; pages 76-7, 107, 162.

The New Mexico Supreme Court held that the residents of northern Catron County have "a common bond of interest by reason of their location on or near Highway 60, and the fact that their normal and usual trade area is not only among themselves but to the east at Magdalena, Socorro and Albuquerque, and to the west into Arizona, but *not* to the north" (R. 1377-8). This conclusion, based on the existence of Highway 60 from the east to the west and the lack of improved roads to the north (R. 1377), may have had some foundation if motor bus carriers were involved, but bears no relation whatsoever to the problem of the public interest; telephone service can be and was adequately provided by the appellant from the north and improved roads play no part in the furnishing of such service. Furthermore, if "a common bond of interest" establishes a

field or territory, the communities of Magdalena and Datil, where Mountain States maintains switchboards, are completely separated from the communities of Quemado, Black Rock and Ramah, where the appellant maintains switchboards, by the continental divide which places the former areas within the continental drainage system of the Atlantic Ocean and the latter areas within that of the Pacific Ocean. The community of Quemado has its natural interests to the north along its side of the divide and the areas serviced by Mountain States have their natural interests on the opposite side of the great divide. For example when there is much snow fall the divide often becomes impassable.

Whereas the New Mexico Supreme Court cited the large area, sparse population and mountainous terrain as a justification for holding northern Catron County to be single territory, the Supreme Court of the adjoining State of Arizona, in interpreting an Arizona statute prohibiting the issuance to common motor bus carriers of duplicate certificates of convenience and necessity to serve the same "territory," considered the large area and "rough" terrain as justifying a restrictive interpretation of territory on the realistic basis that the prior operator was not operating in any larger territory. *Corporation Commission* v. *Pacific Greyhound Lines*, 169 P. 2d 511 (1946). In a specially concurring opinion, detailing the basis of the court's opinion, it was said at page 515:

> "The 'territory' consists of the termini and the route served. Where the termini is to be served by a wholly different route, opening up new country, the result is a new territory. . . ."

It is the very characteristic of the tremendous geographical area involved in this case that requires that it be subdivided for telephone service purposes. The simple economics and technology in the industry require that

there be *two* exchanges, one at Datil and one at Quemado. The appellant has a switchboard and an exchange at Quemado and has established a definite exchange area surrounding Quemado (R. 294-7). Mountain States has a switchboard and an exchange at Datil and has established a definite exchange area surrounding Datil (A. 307-8, 944, 945, 949-950). Every possible criterion would dictate that the appellant has established itself first in the Quemado field and that Mountain States has established itself first in the Datil field. Under this obvious construction both utilities would survive. If the New Mexico Supreme Court definition of entire northern Catron County as a field is correct, then only the appellant is entitled to remain in that territory since by every conceivable test it was the first public telephone utility operating plant and equipment in northern Catron County.

2. *Operation of plant or equipment engaged in a similar public utility service:* Whereas the trial court found that the appellant had completed construction of telephone service facilities to Quemado on May 25, 1961, and had commenced limited service and long distance service in Quemado on May 29, 1961, and limited local exchange service since July 1, 1961 (R. 91-2) and that the appellant "actually had a physical plant and exchange in Quemado prior to the completion by Mountain States of its line to within three miles east of Quemado" (R. 94), the New Mexico Supreme Court held that, although Mountain States did not even purchase the Datil Cooperative equipment until May 29, 1961, and did not begin operation at Datil until July 23, 1961, nevertheless the fact that Mountain States leased some 12 home telephone instruments to the Datil Cooperative since 1953 constituted Mountain States' prior entry into the entire field or territory of northern Catron County (R. 1381-2).

This is without doubt the most arbitrary and capricious

exercise of the police power granted by N.M.S.A. 1953, § 69-8-1 through § 69-8-3, which can be imagined and it effectively destroys the appellant's property without compensation in utter disregard of the due process clause. In order to sustain the New Mexico Supreme Court decision it is necessary to conclude that the renting of some 12 home telephone instruments by Mountain States to the Datil Cooperative constituted Mountain States as having "in operation any . . . plant or equipment engaged in a similar [public utility] service" (N.M.S.A. 1953, § 69-8-1) in northern Catron County.

The Datil group built the telephone pole line to Magdalena, owned it and maintained it (R. 332, 369), and contracted with Mountain States to switch its dial calls at Magdalena and give it "operator service" out of Socorro, because there were no operators in Magdalena (R. 369). Mountain States' witness testified regarding the Datil line (R. 534):

> "Q. And this corporation owned this telephone line?
> "A. Yes.
> Q. Mountain States had no interest in it?
> "A. No."

The Datil Cooperative or partnership leased the home telephone instruments from Mountain States. Mountain States' witness testified that the home telephone instruments were the *only thing* owned by Mountain States in the Cooperative system and that these were rented by Mountain States to the Cooperative group (R. 559-60).

On May 29, 1961, Mountain States obtained a Bill of Sale from the owners of the Datil Cooperative under which the Datil Cooperative subscribers transferred to Mountain States the line from Magdalena to Datil and the local sub-

scribers' lines in and around Datil. Mountain States paid $9,400 to the Datil Cooperative for the Cooperative's "telephone poll lines, wire, equipment and facilities" (R. 932-3). Sometime after June 1, 1961, Mountain States took physical control of the Cooperative's line and commenced improvements including the construction of an exchange building at Datil and the installation of a switchboard therein. The Mountain States' Datil exchange was in operation on or about July 23, 1961 (R. 93), almost two months after the appellant had provided service at Quemado.

In *Socorro Electric Cooperative, Inc.* v. *Public Service Company*, 66 N. Mex. 343, 348 P. 2d 88 (1959), the New Mexico Supreme Court held that *a cooperative is not a public utility*. The court quoted with approval the various definitions of a public utility which make the crucial test whether it serves or is willing to serve the indefinite public which has a legal right to demand and receive its services (73 C.J.S. Public Utilities § 3, page 992; 43 Am. Jur. 571, Public Utilities and Services). The court cited with approval the following cases holding that a cooperative association is not a public utility: *San Miguel Power Association* v. *Public Service Commission*, 4 Utah 2d 252, 292 P. 2d 511, *Garkane Power Company, Inc.* v. *Public Service Commission*, 98 Utah 466, 100 P. 2d 571, 132 A.L.R. 1490; and *Clearwater Power Company* v. *Washington Water Power Co.*, 78 Idaho 150, 299 P. 2d 484, where the Idaho Supreme Court interpreted a statute similar to N.M.S.A. 1953, § 69-8-1, as follows at page 485:

> "The power thus given to the commission to prevent interference by extensions of a public utility into territory already served, is limited to territory already served 'by another public utility,' and the complaint which the commission is authorized to hear is the 'complaint of the public utility claiming to be injuri-

ously affected.' . . . The Commission is given no authority . . . to hear the complaint of cooperatives."

To the same effect, see Annotation, 132 A.L.R. 1495.

It is clear that Mountain States never operated as a public utility in Catron County prior to May 29, 1961 and perhaps not until later when it installed a switchboard July 23, 1961. It simply did not have plant or equipment installed and so was *not ready, willing and able* to offer service. Prior to July 23, 1961, Mountain States' only customer was the Datil Cooperative or partnership, never the public. The Datil Cooperative or partnership was not a public utility. The group had one telephone line and it did not have more than the 10 or at the most 12 parties on this single party line. If the Datil Cooperative was not a public utility or giving public utility service, certainly Mountain States was not so doing in Northern Catron County from 1953 to July 23, 1961.

The assignee of, or successor to, a cooperative telephone association's property obtains no status as a public utility unless and until it converts the telephone system to one operated for the public. *Socorro Electric Cooperative, Inc.* v. *Public Service Company*, 66 N. M. 343, 348 P. 2d 88 (1959) and *Peoples Telephone Exchange* v. *Public Service Commission*, 186 S. W. 2d 531 (Mo. Ct. App., 1945).

If anyone had early operating rights in Northern Catron County it was the two predecessor companies, the Salt Lake Company and the Datil Cooperative. Neither operated as a public utility; neither held itself out to offer telephone service to the public. But both had telephone plant and equipment, and operated and furnished a telephone service. By its Bill of Sale, dated May 29, 1961 (R. 932), Mountain States acquired ". . . all easements, rights of way and privileges appurtenant thereto or necessary therefor, now held or owned by the seller. . . ."

The appellant by its Bill of Sale dated December 19, 1960 (R. 260) acquired "All of RMS Co.'s [Rocky Mountain Salt Company] right and title in said lines, their operation, grandfather rights, rights of way, easements and easements by prescription arising from long time existence and establishment of said lines which said RMS Co. may have or acquired from prior owner." If it may be concluded that the appellant and Mountain States acquired the prior operating rights of the respective predecessor companies, the Datil line was built in 1953, but the Salt Lake line was built in 1937, sixteen years before (R. 590):

> "Q. And the telephone line has been across there all of that time?
>
> "A. No, it was built there about a year after I got the place.
>
> "Q. So since 1937, the telephone line has run across your property?
>
> "A. That is right. . . ."

Accordingly, if there is merit in the theory of simple ownership of telephone equipment in Northern Catron County the owners of the Salt Lake line had prior operating rights as against the Datil Cooperative and the appellant acquired those operating rights before Mountain States acquired any rights. It necessarily follows that the Datil Cooperative was an illegal invader in Northern Catron County and Mountain States at best acquired nothing but the rights of an illegal invader.

And even if Suburban and Mountain States were deemed on more or less equal footing from an operating standpoint, it has been held that where a dispute arises between the grantees as to their rights under conflicting grants of franchise, the grantee who first enters into possession in good faith of the privileges granted has the superior right where their rights are otherwise equal. In *Indianapolis, St. R. Co.* v. *Citizens St. R. Co.*, 127 Ind. 369, 24 N. E. 1054

(1890), reaffirmed on motion for rehearing, 26 N.E. 893, two cable car companies, both apparently properly chartered or franchised, sought to occupy the same street within a 30-day period of each other. The court gave priority to the one engaged in *actual construction first* in time, on the grounds the "appellant could not appropriate any portion of a line then in the process of construction." In the present case, Mountain States started no construction in Catron County until after June 1, 1961 (R. 353, 354, 545), by which time the appellant had obtained and accepted its Catron County franchise (R. 261, 265) and was operating its telephone service at Quemado (R. 91-2).

3. *Appellant's franchise:* On January 3, 1961, the appellant obtained a franchise from the Board of County Commissioners of Catron County to operate as a telephone utility (R. 261-4), and the appellant formally accepted the franchise on March 18, 1961 (R. 265), which provides in part as follows:

> "Be It Resolved by the County Commissioners of the County of Catron, State of New Mexico, as follows:
>
> "Section 1. That the Suburban Telephone Co., a New Mexico corporation of Gallup, New Mexico, its lessees, successors and assigns, are hereby granted the exclusive right, privilege and franchise to construct, erect, renew, maintain and operate in, upon, along, across, under and over the streets, alleys and public highways, rights of way thereof and public places of the said county of Catron, lines of poles, anchors, wires, cables, conduits, vaults, laterals, towers and other fixtures and equipment, and to use the same for the transmission of sound, pictures, data or other forms of intelligence by means of electrical current and electromagnetic radiation, and especially for the conduct of a general telephone and radio telephone business where such lines, fixtures and equipment presently exist, and as they may be extended, constructed

or acquired by said company from time to time, for the period of twenty-five years from and after the date of the passage of this resolution."

In reliance on the franchise and as a further acceptance thereof the appellant built into Quemado, installed a switchboard, and gave public telephone service (R. 92). It filed rates with the Corporation Commission on June 6, 1961 (R. 195). The trial court's decision herein indicated that the appellant would be required to add plant and equipment if its service was to be deemed adequate (R. 95, 127). The appellant in reliance thereon has continued to make large investments in expanding the telephone plant in and around Quemado and has an investment substantially in excess of $100,000 (R. 1037).

When Suburban obtained its franchise in January, 1961, Mountain States' closest telephone plant was at Magdalena *over 80 miles away from Quemado.* Mountain States did not acquire the Datil Cooperative System until almost five months later, on May 29, 1961, after the appellant's franchise was a matter of public record and public notice. Mountain States has never obtained a county franchise and so admitted in its pleadings (R. 32, par. 3).

N.M.S.A. 1953, § 68-1-1 provides for the incorporation of utilities under the general incorporation laws of the state. § 68-1-2 provides that "such corporations . . . are authorized to place their pipes, poles, wires, cables, conduits, towers, piers, abutments, stations and other necessary fixtures, appliances and structures, upon or across any of the public roads, streets, alleys, highways and waters in this state *subject to the regulation of the county commissioners* and local municipal authorities." § 68-1-3 provides:

> *"The county commissioners of the several counties are hereby authorized to permit such corporation to use the public highways and the streets and alleys of*

unincorporated towns for their pipes, poles, wires, cables, conduits, towers, transformers, stations and other fixtures, appliances and structures; provided, that such use shall not unnecessarily obstruct public travel and *such county commissioners* and municipal authorities of incorporated cities and towns *are hereby authorized to grant franchises not exceeding twenty five years duration to corporations for such purposes* within their respective jurisdictions." (Emphasis supplied).

In *Mountain States Telephone & Telegraph Co.* v. *Town of Belen*, 56 N.M. 415, 244 P. 2d 1112 (1952), Mountain States had obtained a franchise from the County Commissioners of Valencia County in 1905 for a period of 99 years. In 1918 the town of Belen was incorporated and in 1949 offered a franchise to Mountain States in order to continue its use of the streets and alleys of Belen for its poles, wires and equipment. Mountain States refused to accept the franchise. Belen brought suit to restrain Mountain States from operating within its corporate limits unless it obtained the town franchise, and the lower court issued the injunction. The Supreme Court of New Mexico reversed the lower court and remanded with directions to dismiss the cause with prejudice, stating at page 1121:

". . . the judgment of the trial court in our opinion would impair the obligation of contract, that is, the rights and privileges acquired under the county franchise of 1905, and would deprive defendant telephone company of its property without due process of law contrary to the provisions of the Constitutions of the United States and of the State of New Mexico . . . We are therefore of the opinion that *the original franchise granted by the county commissioners* in the year 1905 *constitutes a valid existing contract and is not subject to impairment or cancellation by* the Town of Belen or *the courts of the State*, as herein sought." (Emphasis supplied.)

The court cited with approval the similar holdings in *City of San Diego* v. *Southern California Tel. Co.*, 92 Cal. App. 2d 793, 209 P. 2d 27 and *City of Beverly Hills* v. *City of Los Angeles*, 175 Cal. 311, 165 P. 924, 926. The court also cited with approval the *City of Roswell* v. *Mountain States Telephone & Telegraph Co.*, 78 F. 2d 379 (10th Cir., 1935), where the United States Court of Appeals held that the franchise, when granted under the New Mexico statutes, becomes a grant from the state itself.

N.M.S.A., 1953, § 69-8-2 by its very language recognizes the validity and prerequisite of the county franchise. That section requires that a party seeking to bring an action under it, make the county proposing to authorize the utility service a party to the suit filed in the District Court. Section 69-8-2 states:

> ". . . Any interested person, corporation, municipal corporation, partnership or association, proposing to construct or operate such second plant or equipment, shall first file a petition in said district court, *to which petition the authority proposing to authorize the construction of such second plant or equipment* and the owner, manager or operator of the plant and equipment then in operation *shall be made parties. . . .*" (Emphasis supplied).

Mountain States did not make the County Commissioners of Catron County parties to this action (R. 1).

In the present case the New Mexico Supreme Court has by its judgment herein not only impaired the obligations of, and cancelled, the appellant's contract and deprived the appellant of its property without due process of law, but in view of the *Town of Belen* case has denied equal protection of the law to the appellant. In *Town of Belen*, the Supreme Court of New Mexico reached a result diametrically opposed to the result in the present case and in both cases, curiously, the beneficiary of its largesse was Mountain States Telephone and Telegraph Company.

4. *Requirement of public convenience and necessity:* Nowhere in these proceedings either by court or by administrative tribunal has there been a finding of fact that "public convenience and necessity" will be served by enjoining the appellant from operating in Quemado or permitting Mountain States to come into Quemado. If the decision of the New Mexico Supreme Court is correct, then the legislature in enacting §§ 69-8-1 through 3, by fiat has determined that the "public convenience and necessity" requires that the appellant's franchise be terminated and its property confiscated under the facts of this case. The facts are that the appellant obtained its franchise in Catron County and built in Northern Catron County when Mountain States was 80 miles away in Magdalena in Socorro County and was on public notice of the appellant's prior franchise. Mountain States rushed in to perpetuate its monopoly; before the advent of the appellant's service, it showed no concern whatsoever for the public convenience and necessity.

CONCLUSION.

In summary, the facts here are that a small independent telephone company complied with the only established statutory requirement and obtained a county franchise. It then invested its capital in reliance thereon, constructed a telephone plant, and brought telephone service for the first time to less than one hundred subscribers who were never able to get telephone service before. Mountain States, an American Telephone and Telegraph Company subsidiary not possessing any franchise, obtained from the state courts an injunction terminating the independent's operating rights. The state courts have accomplished this by adopting a most abnormal view of what is a "field or territory." Even if that view were correct, the whole result is supported solely by the transparent myth that Mountain

States' renting of 10 or 12 home telephone instruments to another legal entity 40 miles west of the established telephone plant of Mountain States constituted "ownership and operation" of telephone plant in that distant territory so as to preclude the operation of an independent telephone company situated *another* forty miles west of the leased telephones. If the New Mexico Supreme Court's holding that Mountain States' acquisition of telephone plant at Datil on May 29, 1961 related its ownership and operation of plant in the territory *back* to the Datil Cooperative's beginning in 1953, were correct (as it obviously is not), the ultimate judgment is erroneous nevertheless because the appellant acquired in December, 1960 telephone plant in Quemado which plant had been in existence since 1937. And at all events, there has been no finding by any administrative or judicial tribunal, that the public convenience and necessity will be served by this unbridled assertion of police power to confiscate private property.

For the reasons stated above, the questions presented are important ones which should be resolved by this Court.

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APPENDIX A.

Opinion of Supreme Court of New Mexico of June 24, 1963.

CARMODY, Justice.

We are here concerned with a controversy between two competing telephone companies. Neither party to the case being satisfied with the trial court's decision, one appealed and the other cross-appealed.

For clarity, Suburban Telephone Company (which is the appellant and cross-appellee), will be referred to merely as "Suburban," and The Mountain States Telephone and Telegraph Company (appellee and cross-appellant) will be simply termed "Mountain States."

Mountain States brought suit against Suburban in the District Court of Catron County, to enjoin Suburban from constructing or operating any telephone facilities in Quemado, New Mexico, and the surrounding rural area. Alternatively, Mountain States sought an order of the court for a certificate of public convenience and necessity for the duplication of services in Quemado and its area if the court should find that Suburban was already engaged in rendering telephone service to this community, provided Suburban did not, within ninety days, make such changes and additions to its plant as might be necessary to meet the public's needs.

Suburban answered and counterclaimed, generally denying the allegations of Mountain States' complaint and affirmatively alleging that it had first constructed telephone facilities in the area. The counterclaim alleged existing facilities in Quemado and that Mountain States threatened to build facilities in the said area; therefore, Suburban

sought an injunction. Subsequently, upon motion, intervenors, residents of the general area, were allowed to file a complaint in intervention over the objection of Suburban, this complaint generally seeking the same relief as that sought by Mountain States. Following a lengthy trial, the court rendered its decision, which denied both injunctions but determined that Suburban's service in Quemado and surrounding area was inadequate and that this company would have ninety days to furnish adequate service; and, if unable, then, after hearing, a certificate of convenience and necessity would issue to Mountain States.

Summarizing the facts found by the trial court, it appears that Mountain States for many years has provided general telephone service throughout the state of New Mexico, operating an exchange at Magdalena, New Mexico (some 63 miles east of Datil), and beginning in July 1953 served, through the Magdalena exchange, a ranchers' line which ran westward to a point twelve miles west of Datil; that northern Catron County, along Highway 60, had no telephone service other than the ranchers' line prior to July 1961; that in December 1960, Suburban acquired a telephone line running from Quemado to Salt Lake, New Mexico, and continued to maintain it thereafter; that on May 25, 1961, Suburban completed construction of a temporary telephone line from Fence Lake, New Mexico (approximately 40 miles north of Quemado), and commenced limited service to Quemado on or about May 29, 1961, and long-distance service about the same time; that Mountain States commenced serving the field or territory in July 1953, by virtue of the exchange service over the ranchers' line, and that in October 1959, Mountain States made a definite commitment to the people of northern Catron County that local exchange service would be provided for Datil and Quemado; that following this commitment, Mountain States proceeded with reasonable diligence to plan, construct and

connect the necessary facilities into the area, cutting the Datil exchange into service on July 23, 1961, and rural service out of Datil to customers in Pietown, in October, and filing tariffs with the State Corporation Commission; that Mountain States had not established local exchange service in Quemado, but at the time of trial had completed construction to within three miles thereof; that the actual purchase of the ranchers' line by Mountain States was in September 1960, and Mountain States immediately started rehabilitation and improvement of the facilities; that in the month of June, 1960, Mountain States approved a comprehensive plan for the establishment of exchange and toll service for all of the northern Catron County area. The court then found that while this work was in progress by Mountain States, Suburban, without first applying for a certificate of convenience and necessity, extended its temporary line into Quemado; that the local service offered by Suburban failed to win acceptance by the prospective customers, and that Suburban was aware of the plans of Mountain States to extend its facilities westward from Datil and to furnish service to the whole of northern Catron County, and knew that this plan had been completed except for the construction of a distribution plant for the local exchange and rural ranch areas surrounding Quemado. The court further found that there would be a duplication of service if Suburban constructed a toll line east to Datil; that there is a well-defined need for acceptable local exchange service in Quemado and the surrounding area, and that the majority of the prospective customers have indicated a preference for Mountain States; that Suburban has a physical plant and exchange at Quemado, but the court found that the physical properties and services were inadequate. Finally, it found that if Mountain States and Suburban both served Quemado, there would be a duplication of service, but that at that time there was no duplication of service, since Sub-

urban's line runs south from Gallup to Quemado, and Mountain States' line runs generally along Highway 60.

The court made one other finding, which is of major importance and is the decisive issue in the case. This finding reads as follows:

> "6. One of the issues in this case is the determination of what is meant by the statutory language in Section 69-8-1, 1953 Compilation, 'field or territory.' The Court finds that by the pleadings of the parties and the actions of the residents in Northern Catron County, that it appears all parties concerned have considered the whole of Northern Catron County as one integral unit. The Court accepts the proposition that all that part of Northern Catron County, along Highway No. 60, and both sides thereof, should be treated as a field or territory."

The above facts as found by the court are set out in appellant's brief in chief, in which an attempt is made to attack most of them as contrary to the evidence. The attack, such as it is, directs our attention to the contrary evidence, but neglects to point out the evidence in support of the findings. This is in direct violation of Rule 15(6) (§ 21-2-1(15) (6), N. M. S. A. 1953), *Minor* v. *Homestake-Sapin Partners Mine*, 1961, 69 N. M. 72, 364 P. 2d 134, and we will not disturb the findings of the trial court where the rule is not observed. To compound appellant's violation of the rule, it was conceded upon oral argument by appellant's out-of-state counsel who prepared the brief in chief, that all of the evidence, or the substance thereof, bearing upon the findings had not been included in the brief, nor were transcript references made where we could locate such evidence. Therefore, in such a situation, the trial court's findings as summarized hereinabove are the facts upon which our decision must be based. *Petty* v. *Williams*, 1963, 71 N. M. 338, 378 P. 2d 376; *Lance* v. *New Mexico Military Academy*, 1962, 70 N. M. 158, 371 P. 2d 995.

For a proper understanding of the situation, it is felt necessary to refer to the geography, population and industry of Catron County, New Mexico. This county, located in the extreme westerly part of New Mexico, is the largest in area of any in the state, having some 6,898 square miles but with a population of only 2,773 as shown by the 1960 census. A large part of the county is mountainous and the people living therein are principally concerned with stock raising and mining. Traversing the northerly quarter of the county is U. S. Highway 60, which, within the county, is some ninety miles in length. On the highway, there are three small communities of Datil, Pietown and Quemado, which are twenty-one miles apart, in the order given. Although the Bureau of Census apparently has not compiled figures on the population of these three communities, it would seem, when we consider the total votes cast in the general election of 1962, that the general area served by Highway 60 has approximately one-third of the total population of the county. Thus, it can be safely assumed, we believe, that the northern area of Catron County with which this lawsuit is concerned has a population of somewhat less than 1,000 persons. Figures are not available to indicate how many of these people live in any specific area, but based upon the voting population, it appears that the population of the Quemado precinct is about equal to that of both Datil and Pietown. We are not advised, however, as to what portion of the voting public live in Quemado itself, as distinguished from ranchers residing in out-of-the-way areas. Highway 60 is the only paved road connecting this part of the county with the rest of New Mexico, other than a paved highway running southward from the community of Datil to Reserve (the county seat) and thence to southwestern New Mexico. More than 100 miles to the north of both Quemado and Pietown is the city of Gallup. Roads to Gallup, however, are only partially improved, and a substantial portion is unimproved.

This explanation is to make evident to anyone not familiar with this part of New Mexico that the area is very sparsely populated—the whole of Catron County has a population per square mile of only 0.4. It should also serve to make manifest, as it must have been to the trial court, that the residents have a common bond of interest by reason of their location on or near Highway 60, and the fact that their normal and usual trade area is not only among themselves but to the east at Magdalena, Socorro and Albuquerque, and to the west into Arizona, but *not* to the north.

The whole issue of the case relates to the construction of the statute (being §§ 69-8-1, 69-8-2 and 69-8-3, N. M. S. A. 1953) as it applies to the facts of the case. For convenience and understanding, the three sections above-mentioned are set out in full:

> "69-8-1. Duplication of certain public utilities prohibited.—It shall hereafter be unlawful to construct, own, operate, manage, lease or control any plant or equipment for the furnishing of any public utility service contemplated by article XI, section 7 of the Constitution of the state of New Mexico, in the same municipality, field or territory where there is in operation any such plant or equipment engaged in a similar service unless public convenience and necessity shall require such second plant or equipment.
>
> "69-8-2. Determination of convenience and necessity upon petition.—Such question of public convenience and necessity shall be determined upon petition and hearing in the district court of the county wherein the proposed second plant or equipment is to be operated. Any interested person, corporation, municipal corporation, partnership or association, proposing to construct or operate such second plant or equipment, shall first file a petition in said district court, to which petition the authority proposing to authorize the construction of such second plant or equipment and the owner, manager or operator of the plant and equipment then in operation shall be made parties. The

petition shall set up the reasons why public convenience and necessity require such second plant or equipment. If the judgment of the court upon said hearing shall be that public convenience and necessity do not require the proposed second plant or equipment, the petition shall be dismissed at the cost of the petitioners; but if the court shall find that public convenience and necessity require that additional plant or equipment is necessary, then it shall issue an order in the alternative directing the owner, manager or operator of the plant and equipment then in operation to make such changes and additions in plant as may be necessary to meet the public convenience and necessity within ninety (90) days, or such other additional time as the court may set, and if such changes or additions are not made within the time ordered by the court, then a certificate of public convenience and necessity for such second plant and equipment may issue.

"69-8-3. Injunction when issued.—When it shall appear that any second plant or equipment, as above described, is about to be authorized or constructed contrary to the terms of this act [69-8-1 to 69-8-6], or that any municipal corporation is attempting to construct, own, operate, manage or control any second plant or equipment contrary to the terms of this act, the owner or owners, operator or operators, manager or managers, lessee or lessees of any plant or equipment then in operation in said municipality, field or territory and engaged in a similar service, may apply to the district court of the county in which said authorization, construction or operation is threatened for a restraining order and injunction against the construction, owning, operation, management, leasing or control of such second plant or equipment, and the court shall make such restraining order and injunction perpetual unless it be established at the hearing before said court that public convenience and necessity require such second plant and equipment, in which case the court shall grant the alternative order as specified in section 2 [69-8-2] hereof."

Inasmuch as none of the named communities are what ordinarily would be termed a "municipality," the key words to be construed are "field or territory where there is in operation any such plant or equipment engaged in a similar service."

Although there is little definitive material from which a definition of "field" or "territory served" may be ascertained, an exhaustive search of the books and texts serves to give us some guidelines by which certain generalities may be drawn. "Territory" is defined in Webster's Third New International Dictionary as "a geographical area of indeterminate extent; region; tract." One of the definitions of "field," in the same source, is:

> "* * * a limited or demarcated area of knowledge or endeavor to which pursuits, activities, and interests are confined, often one determinedly chosen at a certain time or by the necessities of a situation."

In the sense used in the statute, the terms "field" and "territory" are analogous to the term "area," and most of the cases seem to discuss "area" more frequently than "field" or "territory."

In *Puget Sound Nav. Co.* v. *Director, etc., of Pub. Works*, 1929, 152 Wash. 417, 278 P. 189, the court said:

> "The question, what is territory already served, is a question of fact."

and further:

> "* * * Before that fact can be determined, it requires consideration of economic conditions, oftttimes involving expert testimony; * * * the question of population warranting additional facilities * * *."

In *Utah Power & Light Co.* v. *Public Service Commission*, 1952, 122 Utah 284, 249 P. 2d 951, the inquiry was whether the existing utility "professed or agreed to serve" the disputed area. The Kentucky court, in *H-F-C Rural Tel.*

Co-op. Corp. v. *Public Service Com'n* (Ky. App. 1954), 269 S. W. 2d 231, agreed that the "area" was served by the existing utility if the surrounding territory was reasonably well covered by its service, despite gaps therein, finding it "proper *under the circumstances* to treat the territories as part of the area that was being furnished service." *In Re Bolton*, 9 P. U. R. 3d 140 (Ohio Public Utilities Commission 1955), the commission said:

> "* * * We hold that the boundary map is not controlling and is only one factor of several to be considered. * * * It is, of course, axiomatic that a utility is obliged to serve without preference or discrimination in the area in which it purports to operate. * * *
>
> "It may be said in passing that the determination of 'the operating area' of any utility is always a difficult matter and presents this commission with a difficult question of fact. It also appears that these determinations occur most frequently in the telephone industry. * * *
>
> * * * * *
>
> "* * * In this proceeding the commission must determine, as the basic issue, where the operating areas of the parties abut. * * * In making this determination it does, of course, consider the filed boundary maps but it must also take into account many other factors, such as the existence or non-existence of service facilities in the disputed area, which company or companies provide the service, the circumstances and conditions under which service is offered, and the community interest of the area involved."

See, also, *Public Service Co. of Colorado* v. *City of Loveland*, P. U. R. 1928C 35 (Colorado Public Util. Commission 1928), for pertinent discussion and definition of "territory" and "serve."

It is apparent that the words "field or territory" as used in the statute might very properly have been found by the trial court to be all of that part of northern Catron

County along Highway 60 and both sides thereof. The finding to that effect is amply supported by the evidence.

The next question which arises in construing the statute concerns which of the parties actually had in operation any plant or equipment. The trial court found that Suburban's establishment of a *telephone exchange* at Quemado was first in time. As of the time the complaint was filed, Mountain States did not have a telephone exchange in the area, but it was serving part of Catron County through the facilities of the ranchers' line from its telephone exchange at Magdalena, which exchange is actually located in Socorro County and not in any part of Catron County. However, the ranchers' line had been operated by Mountain States since 1953, and, other than the telephone wires themselves, all *equipment* was owned by Mountain States. It is worthy of note that the trial court found the purchase of the ranchers' line by Mountain States to have been made in September 1960, although from the evidence it is quite apparent that the actual transfer did not occur until shortly after Suburban commenced its service to Quemado. As we view the situation, however, the date of the actual transfer is not determinative, and Mountain States, prior to the filing of the lawsuit, did have equipment engaged in service in the contested area. In a sparsely populated territory such as this, it could hardly be expected that in each small community there would be located a "plant," as contended by Suburban. Actually, Suburban would claim that the operation of a plant (in this case, a telephone exchange) would take precedence over the operation of mere equipment. Bearing in mind the type of area to be served and the evidence before the court, we do not feel that such a limited construction is realistic. The statute plainly says "plant or equipment," and does not limit the operation in the territory to merely a *plant*. So, also, we decline to read into the statute the type of exclusive

language sought by Suburban and are of the opinion that Mountain States was first in the field or territory, operating equipment therein.

In view of what we have said, it would appear that the factual situation as found by the trial court, and our construction of the statute, reach the following result: (1) The whole area of northern Catron County is one field or territory; (2) Mountain States had in operation in this field or territory equipment engaged in a service similar to that which Suburban sought to install; (3) Suburban's operation of the first exchange in the area at Quemado was "engaging in a similar service" to that which Mountain States already had in operation; (4) Suburban, therefore, before it would have the right to operate in Quemado, or in any other part of the area involved, must have obtained a certificate of convenience and necessity as required under the statute. This it had not done. Therefore, Suburban not only fails to establish its right to an injunction, but, on the contrary, Mountain States, under its cross-appeal, should be determined to have been improperly denied its application for injunction. It must also follow, from our determination of the above questions, that that part of the court's judgment granting Suburban ninety days to furnish adequate service is improper and must be set aside. Of course, nothing said herein should be construed to prevent Suburban, should it desire from applying for a certificate of convenience and necessity to offer duplicate service under the provisions of the statute. In this appeal, however, we do not reach the question of whether or not Suburban's present service in Quemado is inadequate.

The case on the main appeal will be affirmed, but reversed as to the cross-appeal and remanded to the trial court with direction to enter a new decision and judgment in conformity herewith. It is so ordered.

COMPTON, C. J., and CHAVEZ and NOBLE, JJ., concur.

MOISE, J., having recused himself, not participating.

APPENDIX B.

Judgment of Supreme Court of New Mexico of June 24, 1963.

This cause having heretofore been argued, submitted and taken under advisement, and the court being now sufficiently advised in the premises announces its decision by Mr. Justice Carmody, Chief Justice Compton, Mr. Justice Chavez and Mr. Justice Noble concurring, Mr. Justice Moise, having recused himself, not participating, affirming the judgment of the District Court on the appeal and reversing on the cross-appeal, for the reasons given in the opinion of the Court on file;

NOW, THEREFORE, IT IS CONSIDERED, ORDERED AND ADJUDGED by the Court that the judgment of the District Court within and for the County of Catron, whence this cause came into this Court, be and the same is hereby affirmed as to the appeal and reversed as to the cross-appeal, and the cause is remanded to the said District Court of Catron County with direction to enter a new decision and judgment in conformity with said opinion and this judgment.

APPENDIX C.

Order Denying Motion for Rehearing on September 9, 1963.

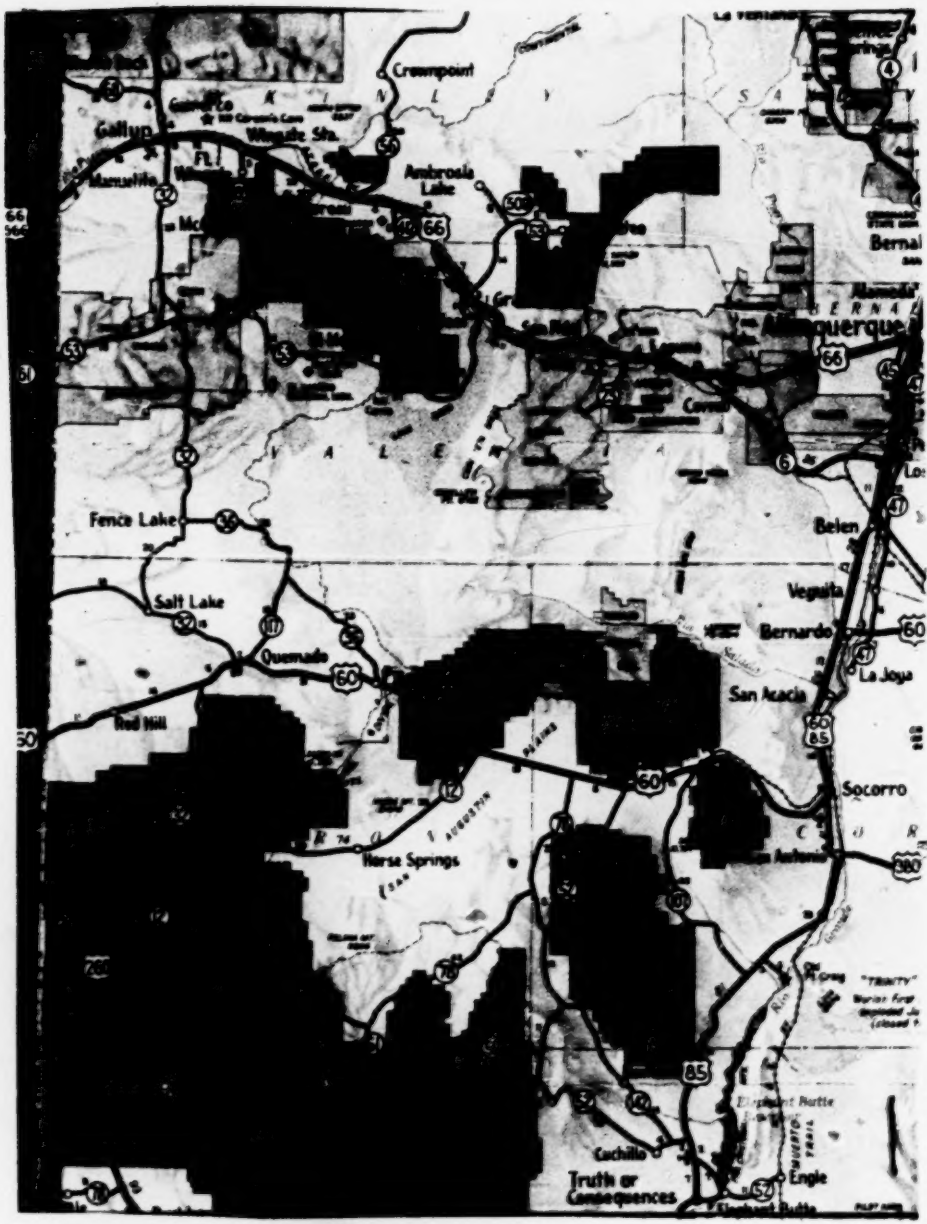
This cause coming on before the Court for consideration on motion of Appellant and Counter-Appellee for rehearing, and the Court having considered said motion and briefs of counsel and being sufficiently advised in the premises,

IT IS ORDERED that the motion for rehearing be and the same is hereby denied, and the Clerk is directed to issue Mandate forthwith.

APPENDIX D.

Portion of Official Road Map of New Mexico.

Issued by State Highway Department.



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No. 800

IN THE

Supreme Court of the United States

OCTOBER TERM, 1963

SUBURBAN TELEPHONE COMPANY, a corporation,
Appellant,

v.

THE MOUNTAIN STATES TELEPHONE AND TELEGRAPH COMPANY, a corporation, et al.,
Appellees.

ON APPEAL FROM THE SUPREME COURT OF NEW MEXICO

MOTION TO DISMISS AND BRIEF OF APPELLEE THE MOUNTAIN STATES TELEPHONE AND TELEGRAPH COMPANY IN SUPPORT THEREOF

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IN THE

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THE MOUNTAIN STATES TELEPHONE AND TELEGRAPH COMPANY, a corporation, et al.,
Appellees.

ON APPEAL FROM THE SUPREME COURT OF NEW MEXICO

MOTION TO DISMISS AND BRIEF OF APPELLEE THE MOUNTAIN STATES TELEPHONE AND TELEGRAPH COMPANY IN SUPPORT THEREOF

Pursuant to Rule 16, Appellee The Mountain States Telephone and Telegraph Company moves to dismiss the appeal from the final judgment of the Supreme Court of the State of New Mexico on the following grounds:

1. The appeal is not within the jurisdiction of this Court because:

A. The appeal is not taken in conformity to the rules of this Court and specifically Rule 15(d).

B. There is no statutory basis for jurisdiction.

2. The federal question sought to be reviewed was

not timely or properly raised, properly pursued or expressly passed on in the state courts.

3. The appeal does not present any substantial federal question.

4. The judgment rests on an adequate non-federal basis.

STATEMENT

Appellant, Suburban Telephone Company (hereinafter, Suburban), is a New Mexico corporation and a subsidiary of a holding company, Universal Telephone Corp. One of the Appellees, The Mountain States Telephone and Telegraph Company (hereinafter, Mountain States), is a Colorado corporation authorized to conduct a general telephone business in New Mexico and other states in the mountain area. Other Appellees not referred to in the title and not discussed in Appellant's Jurisdictional Statement are a group of private citizens and residents of northern Catron County, New Mexico, who appeared individually and collectively and participated in the proceedings in the New Mexico courts through independent counsel.

Fundamentally, this entire litigation involves only two issues: First, what is the proper interpretation to be given to the term "field or territory" as used in New Mexico Statutes Annotated, 1953, § 69-8-1 (section is quoted pp. 21-22, Applt's Jur. Stat.); i.e., what are the proper geographical limits of such "field or territory"? Second, which of the two competing companies was first in time to establish service within the "field or territory" so fixed? Both parties relied upon the same sections of the statute (N.M.S.A., 1953 §§ 69-8-1 through 69-8-3). The findings of the New Mexico courts were that the "field or territory" comprised all of northern Catron County, and that Mountain States was first to serve this territory.

Under these circumstances, the United States Supreme Court on appeal will not review findings of fact first established by the trial court and later approved by the highest appellate court of the state. Unless this Court, contrary to its previous decisions (discussed post), reopens approved findings of fact, the only remaining inquiry to be pursued by this Court involves alleged invasion of Suburban's federal constitutional rights. At no point in the litigation in the state courts did Suburban ever contend a violation of its constitutional rights, by virtue of the granting of injunctive relief to Mountain States, *until* these constitutional questions were first raised by Suburban in its Motion for Rehearing (R. Vol. VII, pp. 1386-1388) directed to the New Mexico Supreme Court. The only question before this Court is whether Suburban—having had its day in court and having been enjoined from invading the territory of another utility—may now claim a violation of constitutional rights.

Mountain States has no objection to Suburban's description of the beginnings of Suburban by incorporating in New Mexico and purchasing communication facilities from the Indian Service. The important point is that in all of these original efforts, the activity of Suburban was limited to points in McKinley and Valencia counties, and there was no difficulty between the parties until Suburban extended its facilities southward into northern Catron County—a territory claimed by Mountain States.

Before this litigation was initiated, there was in existence a contract between the same parties dated March 21, 1961, specifying the particulars and payments to be made from Mountain States to Suburban for interchanged long-distance business (R. Exh. J, Vol. II, pp. 273-292). In that contract, the following clause appears: "The Independent Company will not, without the written consent of the Bell Company, connect the toll lines of the Bell Company with any toll lines other than those indicated in 'Ex-

hibit A.'" Exhibit A, attached to this contract, shows the diagram of Suburban's toll lines to be interconnected with Mountain States and the point of interconnection; namely, between Zuni and Gallup, New Mexico. Suburban's Zuni and other exchanges are all located in McKinley and Valencia Counties in New Mexico and there is nothing in this contract permitting interconnection of Suburban's toll lines between Gallup and any point in Catron County.

As to the original installations referred to as the Zuni system, located at Black Rock and other points in Valencia and McKinley Counties, extending as far south as Fence Lake, the normal Mountain States-independent company relations existed, with Mountain States providing toll connections to the intrastate and interstate network for Suburban exchanges through Mountain States' Gallup Exchange (R. Vol. III, pp. 425, 449; Exh. 28-38, Vol. IV, pp. 986-998; Exh. H, Vol II, p. 271; Exh. O, Vol. VI, pp. 1042-1043; Exh. S, Vol. VI, p. 1047).

When it came to the attention of Mountain States that Suburban was, in fact, extending its lines into the town of Quemado and the surrounding rural area, more specifically described as the Quemado Exchange area in a filing with the State Corporation Commission (R. Exh. 11, Vol. VI, pp. 943-945), Mountain States discontinued any further work in that area and commenced litigation on July 25, 1961; the intent being to have the issue of the contested area resolved by the courts.

A complaint was filed in the New Mexico District Court of Catron County seeking a finding that Mountain States was rendering utility service in the town of Quemado and surrounding rural area and an order enjoining Suburban from constructing, owning or operating facilities or providing service in said municipality, field or territory. In the alternative, in the event the court found Mountain States was not first in the area, the Complaint

sought a certificate of convenience and necessity pursuant to Section 69-8-1 (R. Vol. I, pp. 1-13).

Suburban thereupon answered the Complaint denying the allegations of Mountain States, and asserted a counterclaim (relying on the same New Mexico statutes that it is now attacking) asking for the issuance of an injunction against the construction, ownership or operation by Mountain States of telephone service, either local or long-distance, in the field or territory claimed by Suburban (R. Vol. I, pp. 14-23).

The trial court found, as a matter of fact, the Suburban was first in Quemado, but that all northern Catron County running along Highway 60 in an east-west direction, *including Quemado*, was one field or territory within the meaning of the New Mexico statute, that Mountain States was first in this territory, and that the majority of the residents of the territory desired Mountain States to serve them. (R. Vol. I, pp. 92-95) However, the trial court did not grant either party the injunction sought. Upon appeal of Suburban and the cross-appeal of Mountain States, the Supreme Court of New Mexico remanded to the trial court with instructions to grant the injunction sought by Mountain States. It is from this decision that Suburban appeals.

REASONS FOR DISMISSING THE APPEAL

I. The Appeal is Not Within the Jurisdiction of This Court.

A. *The Appeal is Not in Conformity to the Rules of This Court, and Specifically Rule15(d)*

Rule 15(d) of the Revised Rules of the Supreme Court of the United States provides, in part, as follows:

> "If the appeal is from a state court, the statement of the case shall also specify the stage in the proceedings in the court of first instance, and in the appellate

> court, at which, and the manner in which, the federal questions sought to be reviewed were raised; the method of raising them. . . ; and the way in which they were passed upon by the court; with such pertinent quotations of specific portions of the record, or summary thereof, with specific reference to the places in the record where the matter appears . . . as will support the assertion that the rulings of the court were of a nature to bring the case within the statutory provisions believed to confer jurisdiction on this court."

Appellant's Jurisdictional Statement is devoid of even an attempt to comply with this rule. Appellant has not shown when or how any constitutional questions were raised, and has referred to no rulings by the trial court or the Supreme Court of New Mexico on any such constitutional questions.

In the absence of a showing that there was a ruling of the state court of a nature to bring the case within this Court's jurisdiction, the appeal should be dismissed. *Southwestern Bell Tel. Co. v. Oklahoma*, 303 U.S. 206 (1938); Rule 16(a) Revised Rules of the Supreme Court of the United States.

B. *There is no Statutory Basis for Jurisdiction*

The jurisdiction of the Supreme Court of the United States to review on appeal a final judgment of a state appellate court is defined and limited by Section 1257, Title 28, U.S. Code. Subsection (2) confers jurisdiction on appeal "where is drawn in question the validity of a statute of any state on the ground of its being repugnant to the Constitution, treaties or laws of the United States, and the decision is in favor of its validity." This is the section relied upon by Suburban.

In cases appealed from state courts, involving state laws, the statute confers jurisdiction in one class of cases and in no other. To come within that class an appellant

must show that it has drawn in question, on constitutional grounds, the validity of a state statute, that the question was expressly passed upon by the state court, and that the statute was found valid.

The statute involved (N.M.S.A., 1953, §§ 69-8-1 through 69-8-3) is quoted in full in the Opinion of the New Mexico Supreme Court (reproduced in Suburban's Jurisdictional Statement, pp. 42-43). Briefly, it provides that no telephone plant or equipment may be constructed or operated in a field or territory where there is in operation other plant or equipment, unless the district court finds that the public convenience and necessity require the second system.

Neither the opinion of the New Mexico Supreme Court nor the findings and judgment of the trial court expressly considers, discusses or rules upon any question of constitutionality in connection with this statute. In the trial court, both parties sought relief under and relied upon the statute. Mountain States, contending it was first in the field or territory, sought an injunction against Suburban in accordance with Section 69-8-3. Suburban, contending it was first in the field or territory, similarly sought an injunction against Mountain States. The ultimate finding of the New Mexico Supreme Court was that Mountain States was first to own and operate a telephone plant or equipment in the field or territory of northern Catron County (Applt's Jur. Stat. p. 47).

It is this *finding of fact*, and not the validity of the statute, that Suburban seeks to attack in this Court. The gist of the argument is stated at page 22 of the Jurisdictional Statement:

> "It is an elementary principle of both public utility law and constitutional law, as well as the statutory mandate of N.M.S.A., 1953, § 69-8-1, that the first or existing public utility in the 'field' is entitled to protection from a second utility taking or destroying the

prior entrant's property (1) unless the public convenience and necessity require additional service and (2) unless the prior entrant is unable to furnish such additional service. 3 Blackstone, Commentaries *219; Schwartz v. Illinois Commerce Commission, 409 Ill. 182 (1951).

"The New Mexico Supreme Court reached its decision destroying the appellant's business and perpetuating the monopolistic business of Mountain States although by every possible criterion, discussed hereafter, the appellant was the first entrant in the field and was ready, willing and able to furnish any additional service found to be reasonably necessary."

In the first quoted paragraph, Suburban states that Section 69-8-1 embodies an elementary principle of constitutional law. The argument of the second paragraph is not that the New Mexico Court's decision interpreted the statute itself in a manner contrary to that principle of constitutional law, but that the court wrongly interpreted the evidence and hence reached an incorrect conclusion as to the facts in this case. The court, Suburban says, "reached its decision . . . although by every possible criterion . . . the appellant was the first entrant in the field."

The opinion of the New Mexico Supreme Court discusses the criteria on which the trial court based its finding that Mountain States and not Suburban was the first entrant in the field. The court considered the geography, population and industries of the area, the highways and transportation, the trade areas and the community of interest. There was evidence that "the residents have a common bond of interest by reason of their location on or near Highway 60, and the fact that their normal and usual trade area is not only among themselves but to the east at Magdalena, Socorro and Albuquerque, and to the west into Arizona, but *not* to the north." This was the conclusion of the New Mexico Supreme Court (Applt's Jur. Stat. p. 42).

There was evidence that Mountain States had served the northern Catron County area through a rancher's line from Magdalena since 1953 (R. Vol. III, pp. 332, 370; Vol. IV, p. 559). There was also evidence that Suburban owned a one-circuit private line between Salt Lake and Quemado since December 1960 (R. Vol. IV, pp. 623-624). This line was not used for telephone service offered to the public until May 29, 1961.

On this and other evidence and these criteria, the trial court found that the field or territory comprises that part of Catron County running east and west along Highway 60, and that Mountain States was the first telephone company providing service in that field or territory (R. Vol. I, p. 92).

Suburban points to other criteria which lead Suburban to a different conclusion. Perhaps a different conclusion is possible from the evidence Suburban cites, but it is not the function of this Court to review the trial court's findings, sustained on appeal, to determine whether they are supported by substantial evidence.

Further, as pointed out in the opinion of the New Mexico Supreme Court in this case, Suburban failed to comply with the rules of the New Mexico Supreme Court in attacking the findings of fact made by the trial court and therefore such findings of fact were precluded from review (Applt's Jur. Stat. p. 40).

Suburban has not raised any real question as to the constitutionality of Sections 69-8-1 through 69-8-3, N.M.S.A., 1953. Suburban sought relief in the trial court on the theory of the validity of the injunction provision of Section 69-8-3. It founded its case in the Supreme Court of New Mexico on the same theory. In its Motion for Rehearing, Suburban again relied on the same statute (Para. 2 and 4 of the Motion for Rehearing), but then, in the next paragraph, claims that the granting of injunctive relief

to Mountain States under its cross-appeal resulted in fundamental error and an invasion of Suburban's constitutional rights (Motion for Rehearing, Vol. VII, pp. 1386-1388).

Suburban's contention in this appeal is a complete reversal of the position it took in the trial court and in its Brief in Chief in the Supreme Court of New Mexico on the constitutionality of Sections 69-8-1, et seq. It was *only* in the Motion for Rehearing—after losing the case on the facts and merits—that Suburban turned about-face and attacked the injunction provision of the statute as unconstitutional.

Suburban's position in the trial court is stated in its requested conclusions of law. First it requested a conclusion that Suburban furnished telephone service in the Quemado territory prior to the time Mountain States entered the field or territory (Para. 2, R. Vol. I, p. 88). It contended that Suburban was entitled to injunctive relief against Mountain States (Para. 8, R. Vol. I, p. 89). Finally, the contention was that if Mountain States were granted its alternative prayer and permitted to duplicate Suburban's facilities, such authorized duplication would constitute a taking of Suburban's property without due process of law (Para. 5 and 6, Vol. I, p. 89).

In other words, Suburban argued that it would be deprived of its constitutional rights if it were *not* granted an injunction prohibiting Mountain States from extending its lines in the Quemado area.

Again, in the Brief in Chief in the New Mexico Supreme Court, Suburban pointed to the inconsistency of the trial court's judgment in refusing an injunction to either party. It argued that one party or the other was entitled to an injunction. It was there stated:

> "It is submitted that if all of Northern Catron County along U.S. Route 60 is properly a 'field or territory' under the statute, then one of the parties, presumably whichever one was there first, would, under

> the statute, be entitled to an injunction against the other's construction and operation." (R. Vol. VII, pp. 1203-1204)

Suburban's argument, of course, was founded on the supposition that Suburban was first in the field or territory. The facts found by the trial court in favor of Mountain States were approved by the Supreme Court, but instead of conceding that the same reasoning should apply, Suburban changes its position a full 180 degrees and argues that the injunction statute is unconstitutional. From the argument first made in the Motion for Rehearing and now presented in this Court, it can only be concluded that Suburban's theory is that if an injunction were granted against Mountain States under the statute (Sec. 69-8-3), the statute would be valid, but if the statute permits an injunction against Suburban, as ordered by the Supreme Court, then it is unconstitutional.

A litigant cannot seek relief under a statute, claiming it is valid, and then—if it is denied relief on the basis of the facts—claim that the statute is unconstitutional.

> ". . . whatever rights of property appellant claimed in respect of the specified lands, or the oysters thereon, were necessarily based upon the statute itself, and . . . he could not both assail it and rely upon it in the same proceeding." *Hurley v. Commission of Fisheries*, 257 U.S. 223 at 225 (1921)

See also, *Booth Fisheries Co. v. Industrial Commission*, 271 U.S. 208, at 211 (1926); and *Kansas City M.&B.R. Co. v. Stiles*, 242 U.S. 111 at 117 (1916).

II. Alleged Federal Questions Were Not Timely Raised, Properly Pursued, or Expressly Passed Upon

Assuming for the moment that there might be a substantial federal question involved in this case, it is clear that the question was never properly raised or preserved

by Suburban, or expressly passed upon by the New Mexico Supreme Court.

Nowhere in Suburban's Answer and Cross-Complaint in the trial court (R. Vol. I, pp. 14-23) was there any attempt to challenge the constitutionality of the New Mexico Statutes. Under New Mexico procedure, defenses not specifically raised are considered waived (N.M.S.A., 1953, Sec. 21-1-1 (8) (c) and Sec. 21-1-1 (12) (h)). These rules are nearly identical to correspondingly numbered Federal Rules of Civil Procedure.

The constitutional questions Suburban seeks to have this Court consider were not raised at all in the trial court and were not raised in the Supreme Court of New Mexico until the Motion for Rehearing was filed. In fact, Suburban's Cross-Complaint in the trial court asked for the *same* relief which is now attacked as unconstitutional.

The only constitutional question at the trial level was raised by Suburban's requested conclusions of law and was addressed solely to the alternative relief asked by Mountain States—that is, a certificate of convenience and necessity to provide duplicate service if Suburban was found to be already serving the area. At that juncture, Suburban contended that to permit duplicate service in an area already served by it would deprive it of its property without due process of law.

This same constitutional question—dealing only with the authorization of duplicate service—was the only constitutional question argued in Suburban's Brief in Chief in the New Mexico Supreme Court (R. Vol. VII, pp. 1274-1277). No question was raised by Suburban as to the constitutionality of the injunction provisions of Section 69-8-3, and indeed it could not raise any such question since Suburban itself relied on this statute in seeking an injunction against Mountain States. It was only in the Motion for Rehearing, after the case was decided against Suburban,

that it raised the constitutional question now argued in this Court.

> "It has been many times held in this court that an attempt to introduce a Federal question into the record for the first time by a petition for rehearing is too late. (Citing cases)" *Forbes v. State Council of Virginia*, 216 U.S. 396, 399 (1910)

See also:

Radio Station WOW v. Johnson,
326 U.S. 120, 128 (1945)

St. Louis & S. F. R. Co. v. Shepherd,
240 U.S. 240, 241 (1916)

McMillen v. Ferrum Mining Co.,
197 U.S. 343, 347 (1905), and cases there cited.

The exception to this rule is when the state court accepts the motion for rehearing and passes upon the federal question. *Forbes v. State Council of Virginia*, supra. This, however, is not the case at hand; the New Mexico Supreme Court denied, without opinion, Suburban's Motion for Rehearing (Applt's Jur. Stat. p. 49, Appendix C). Therefore, under the well-established principles of this Court, the appeal of Suburban should be dismissed.

That Suburban is aware of these patent defects in its case is apparent from its failure to make even a minimal effort to comply with Rule 15 of this Court in setting out in its Jurisdictional Statement where, when and how it raised the supposed federal questions and how the court decided these questions.

Instead, Suburban—going completely beyond the record—attempts by innuendo to impugn the integrity of the New Mexico Supreme Court (Applt's Jur. Stat., pp. 20, 33), and attempts to raise the specter of monopoly, attacking the American Telephone and Telegraph Company and the Bell System. Although Mountain States is an associated operating company of the Bell System, neither the American Telephone and Telegraph Company nor the Bell

system (not a corporate entity) were parties to any phase of this litigation.[1]

Never in the pleadings in the trial court, in the requested findings and conclusions or in the briefs in the trial court or in the Supreme Court of New Mexico did Suburban ever attempt to inject any issue or place any reliance upon antitrust or monopoly statutes—federal or state. Neither the trial nor appellate courts in New Mexico ruled upon or mentioned any such matters.

The citations, statements and arguments in Suburban's Point I under the heading "The Questions are Substantial," beginning on page 12 of the Jurisdictional Statement and continuing through several succeeding pages, are not only completely outside the record, but are superfluous, foreign and immaterial. It is inconceivable that the matter contained in these pages is pertinent or lends support to Suburban's Jurisdictional Statement.

III. There Is No Substantial Federal Question

A. *The Grounds for Jurisdiction on Appeal From an Appellate Court of a State are Narrow and Limited*

Suburban, in its Jurisdictional Statement, contends that there are substantial federal questions in this case involving impairment of the obligation of contract, due process, equal protection of the law and the taking of Appellant's property without compensation.

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[1]On July 10, 1961, Suburban filed a Complaint with the Federal Communications Commission, Docket 14199, charging both Mountain States and American Telephone and Telegraph Company with violation of the Federal Communications Act, 47 U.S.C.A. § 314, and the Antitrust Acts, 15 U.S.C.A. § 2 and § 18, and alleging that the acquisition of the lines and equipment of the Datil Cooperative would substantially lessen competition and restrict commerce in the State of New Mexico and tend to create a monopoly. By Order of the FCC released February 26, 1962, this Complaint was dismissed and a Petition for Reconsideration was denied by Order released Octiber 19, 1962. There was no appeal. The Complaint filed with the FCC had nothing whatever to do with the issues in the litigation here appealed from.

There is no substantial issue that can be considered by this Court on any of these constitutional grounds. Fundamentally, Suburban's complaint is only that the New Mexico Court has erroneously interpreted New Mexico law and incorrectly applied the statute in this case—in other words, as stated at page 20 of the Jurisdictional Statement, "the action of the Supreme Court of New Mexico in this case does not satisfy the requirements of Sections 69-8-1 through 69-8-3."

This Court's jurisdiction on appeals claiming violation of the contract clause and denial of due process or equal protection of the law is narrow and limited. The Court has ruled repeatedly that it is not concerned with the correctness of the law adopted by the appellate court of the state and its conformity with authority; that this Court does not hold the relation to the controversy between the parties which the state appellate court had; that it was the duty of the state appellate court to ascertain, declare and apply the law of the state, and its determination of that law is conclusive upon this Court; that the state court's construction of the state statutes is conclusive, and that if the question involves only the proper construction of the statute and not its validity, this Court has no jurisdiction on appeal; that there is no federal question involved in a decision on questions of compliance with the requirements of a state statute; and that this Court is not a court of appeal from the highest courts of the states, except to a very limited extent and for a precisely defined purpose.

Suburban states repeatedly in the Jurisdictional Statement that its attack is upon the statute "as interpreted" or "as construed." If Suburban is attacking the statute at all and not merely the court's findings on the evidence, it is obvious that the question is one of the proper construction of the statute and not of validity.

Central Land Co. v. Laidley,
159 U.S. 103 at 112 (1895)

Powell v. Brunswick County,
150 U.S. 433 at 439-441 (1893)

St. Paul M. and M. R. Co. v. County of Todd,
142 U.S. 282 at 287 (1892)

Sage v. Bd. of Liquidation,
144 U.S. 647 at 651 (1892)

Lehigh Water Co. v Borough of Easton,
121 U.S. 388 at 392 (1887)

Grand Gulf R. R. & Banking Co. v. Marshall,
12 Howard 165 at 168 (1851)

B. *This Case Fails to Come Within the Constitutional Guaranty Against Impairment of Contract*

Assuming arguendo that the constitutional questions sought to be reviewed were properly raised and ruled upon, the facts in this case are not such as would bring it within the constitutional guaranty against the impairment of contract obligations. The guaranties provided by Article I, Section 10, of the Constitution extend only to contracts impaired by state *legislative* action enacted *after* the execution of the contract.

Munday v. Wisconsin Trust Company,
252 U.S. 499 at 503 (1920)

Abilene National Bank v. Dolley,
228 U.S. 1 at 5 (1913)

Chicago B & Q R Company v. Cram,
228 U.S. 70 at 85 (1913)

Blackstone v. Miller,
188 U.S. 189 at 206 (1903)

Oshkosh Waterworks Company v. Oshkosh,
187 U.S. 437 at 446 (1903)

Pinney V. Nelson,
183 U.S. 144 at 147 (1901)

Lehigh Water Company v. Borough of Easton,
supra, at 391

It has been held that the proscription of Article I, Section 10, does not apply to judicial action by state courts.

Barrows v. Jackson,
346 U.S. 249 at 260 (1953) Rehearing denied 346 U.S. 841

Rooker v. Fidelity Trust Company,
261 U.S. 114 at 118 (1923)

Ross v. Oregon,
227 U.S. 150 at 161, 162 (1913)

Cross Lake Shooting and Fishing Club v. Louisiana,
224 U.S. 632 at 638 (1912)

Bacon v. Texas,
163 U.S. 207 at 216-221 (1896)

New Orleans Water Works Co. v. Louisiana Sugar Refining Co.,
125 U.S. 18 at 30, 38 (1888)

This rule applies even in the situation where a state court may have erroneously construed state law enacted prior to the time of the execution of the contract.

Long Sault Development Company v. Call,
242 U.S. 272 at 277, 280 (1916)

Central Land Company v. Laidley,
supra, at 110, 111

Lehigh Water Company v. Easton,
supra, at 392

Sections 69-8-1, et seq., N.M.S.A., 1953, were enacted in 1941. Suburban was incorporated in New Mexico in September 1960, and acquired its county franchise on January 3, 1961. Any contract it might have entered into, including the franchise, was taken subject to the provisions of existing law, including the requirement that the grantee comply with Section 69-8-1 if it intended to serve an area already served by another company.

A franchise granted by a county under Section 68-1-3, N.M.S.A., 1953, extends to the grantee nothing more than a permissive right to use the highways for the location of its distribution plant. An examination of the Suburban franchise shows on its face that it does not purport to grant

territorial operating rights (franchise is quoted in Jurisdictional Statement, pages 30 and 31). In spite of language to the contrary in Suburban's franchise, a county has no authority to grant an exclusive right to occupy its highways since exclusive franchises are prohibited by the New Mexico Constitution (Article IV, Section 26).

Suburban discusses its Catron County franchise in its Jurisdictional Statement (pp. 30-33). There might be an implication from the argument that territorial operating rights may be established through the existence of a county franchise. Under the laws of New Mexico, territorial rights may be established only by a prior occupancy or, in the alternative, by a proceeding for a certificate of convenience and necessity under Sections 69-8-1 through 69-8-3. A franchise is merely a grant of the right to use highways, streets and alleys. *Roswell v. M.S.T. & T. Co.*, 78 F.2d 379, 383-384 (CCA 10, 1935); followed with approval by the New Mexico Supreme Court in *Ruidoso v. Ruidoso Tel. Co.*, 200 P.2d 713 (1948).[2]

The holding in these cases makes it unequivocally clear that a franchise is not a certificate of convenience and necessity and that under the current New Mexico statutes as so interpreted, a franchise is not a grant of territorial operating rights in the sense of a protected right to serve the public within a defined area.

From these holdings it is equally clear that a franchise granted by a city or county extends nothing more than a permissive right for a utility to use the highways, streets and other public places for the placement of its transmission and distribution plant. If a utility could find a way to distribute its services without using the highways, streets and alleys, a franchise would not be necessary.

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[2]Compare *Agua Pura Co. v. Las Vegas*, 60 P. 208 (1900) and *M.S.T. & T. Co. v. Town of Belen*, 244 P.2d 1112 (1952), also interpreting New Mexico franchise statutes, but these decisions were limited to a construction of the state statutes as they existed prior to 1909 and they applied to franchises granted before 1909.

There are many cities and counties in New Mexico today where utility services are provided without the benefit of any franchise whatsoever.

The penultimate paragraph of the decision here attacked on appeal (Applt's Jur. Stat., p. 47) reaches the same conclusion by ruling that since Mountain States was first to occupy the northern Catron County field or territory, Suburban "before it would have the right to operate in Quemado or any other part of the area involved, must have obtained a certificate of convenience and necessity as required under the statute" (referring to Section 69-8-1), and, accordingly, the injunction applied for by Mountain States was improperly denied. In other words, the granting of a franchise by county authorities does not excuse the grantee from complying with the requirements of Section 69-8-1, et seq., if the territory involved is already occupied by another utility.

No issue concerning the Suburban franchise was raised in the pleadings in the trial court. The findings of fact and conclusions of law requested by Suburban did not refer to or depend upon the franchise (R. Vol. I, pp. 83-90), and neither the trial court nor the Supreme Court passed on the franchise matter since, as stated above, it was first raised in Suburban's Petition for Rehearing in the Supreme Court.

Previously, in briefing the issues on appeal, Suburban's only reference to the franchise is one sentence appearing in its Brief in Chief (R. Vol. VII, p. 1268) stating: "In January 1961 it obtained a County Franchise from the County Commissioners of Catron County." Both parties to this controversy knew that whatever contract or property rights they acquired in the Quemado area would necessarily be affected by a judicial interpretation of the statute and a judicial application of the statute to the facts of this case. Suburban's complaint now is nothing more than that it lost the case. A ruling against one party does

not constitute a basis for invoking the obligation of contracts clause. For more extensive discussion of the franchise issue, see Mountain States' Answer Brief to Appellant's Motion for Rehearing (R. Vol. VII, pp. 1457-1459).

C. *On the Facts Surrounding This Litigation There is No Merit to a Claim of Confiscation or Taking of Property Without Due Process of Law*

For several years prior to 1959, there were requests from residents of northern Catron County for Mountain States to extend its facilities in that area. In October 1959 and again in May 1960, at mass meetings of the local residents in the area attended by representatives of Mountain States, firm commitments were made to extend facilities in this area so as to provide exchange and long-distance service to communities along U.S. Highway 60 (R. Vol. III, p. 336, 357, 464; Vol. IV, pp. 554-555, 557-558; Exh. 22, Vol. VI, pp. 968-977).

The trial court found, and the Supreme Court approved the findings, that Mountain States began serving the area as early as 1953 (R. Vol. I, p. 92). As early as December 1960, and again in April and May 1961, representatives of Suburban were informed of the plan of Mountain States to serve the Quemado area, and this was reiterated by others (R. Vol. III, pp. 426-428, 430, 432; Vol. IV, p. 516; Exh. 26, Vol. ~~IV~~ V, p. 983). According to the announced and approved plans, Mountain States was to construct and cut into service a local exchange at Datil by July 23, 1961, and a similar local exchange in Quemado by December 17, 1961 (R. Vol. III, pp. 358, 453, 488; Exh. 19, Vol. ~~IV~~ V, pp. 962-963; Exh. 42, Vol. VI, p. 1004). By these agreed plans existing facilities and service were to be extended farther westward in northern Catron County to serve both Datil and Quemado.

It was engaged in carrying out that project when Suburban, suddenly and without warning, built its lines southward from the operations in Valencia and McKinley

Counties, purchased an existing private line between Salt Lake, New Mexico, and Quemado, and completed a one-circuit long-distance line available for connection in Gallup by May 29, 1961 (R. Vol. IV, p. 624). In view of the information possessed by Suburban as to the intent, plans and commitment of Mountain States, there can be no doubt but that Suburban made a hurried effort at territory jumping (R. Vol. IV, pp. 563-564).

Certainly from July 25, 1961—the date the original Complaint was filed, seeking injunctive relief—and Suburban's Answer to the Complaint, also requesting injunctive relief—there can be no doubt whatever but that the parties and their respective customers then knew that the Quemado area was in controversy. Under these circumstances, both parties well knew and understood—or should have—that the construction of any plant facilities in the Quemado area and the investment required therefor were a calculated risk and done at the peril of the party making the extension or investment. Particularly after the commencement of the litigation in July 1961, both parties were charged with the knowledge that there was a risk of losing the investment, depending upon the outcome of the litigation. As conceded by Suburban in its Jurisdictional Statement (p. 11), most of its investment in the Quemado area came after the litigation was commenced. Mountain States well understood this risk when it extended its toll lines westward from Datil to a point three miles east of Quemado even though this action was approved by an order of the New Mexico State Corporation Commission. (For copy of the Commission Order, see Exh. 50, R. Vol. VI, pp. 1017-1032)

When a party is and has been involved in litigation, has had its day in court, and the ultimate issues *on the facts* are resolved against that party, it cannot then claim a taking of its property without due process of law.

"The claim that the court, in disposing of some

of the questions, including that of estoppel, misconceived or misapplied the statutory and common law of the state and thereby infringed the due process and equal protection clauses of the 14th Amendment, requires but brief notice. The due process clause does not take up the laws of the several states and make all questions pertaining to them constitutional questions, nor does it enable this court to revise the decisions of the state courts upon questions of state law." *Enterprise Irrig. District v. Farmers Mut. Canal Co.*, 243 U.S. 157 at 165, 166 (1917) and cases cited therein.

"When the parties have been fully heard in the regular course of judicial proceedings, an erroneous decision of a state court does not deprive the unsuccessful party of his property without due process of law, within the Fourteenth Amendment of the Constitution of the United States." (citing cases) *Central Land Company v. Laidley*, supra, at 112.

Similarly see:

Goltra v. Weeks,
271 U.S. 536 at 550 (1926)

Chicago Life Insurance Co. v. Cherry,
244 U.S. 25 at 30 (1917)

Tracy v. Ginzberg,
205 U.S. 170 at 177-178 (1907)

12 Am. Jur., Constitutional Law, sec. 577
at pages 273-274

To the same effect is *Dreyfus v. City of Socorro*, 189 P.2d 878 at 880 (1920), in which a holding of the New Mexico Supreme Court was made that a legislative act claimed to deprive the City of Socorro of its property without due process of law is disposed of upon two considerations, ". . . First, a full judicial hearing is accorded to the City; . . ."

IV. The Judgment Rests On Adequate Non-Federal Grounds

This Court will not review a state court decision where there is an adequate non-Federal basis to support the judgment.

Rule 16(b) of the Revised Rules of the Supreme Court of the United States

Stembridge v. State of Georgia, 343 U.S. 541 at 547 (1952)

Radio Station WOW v. Johnson, supra at 129

Williams v. Kaiser, 323 U.S. 471 at 477 (1945)

Suburban completely failed to comply with the rules of the New Mexico Supreme Court governing the review of findings of fact by the trial court. The court stated (p. 40 of Jurisdictional Statement):

> "The above facts as found by the court are set out in appellant's brief in chief, in which an attempt is made to attack most of them as contrary to evidence. The attack, such as it is, directs our attention to the contrary evidence, but neglects to point out the evidence in support of the findings. This is in direct violation of Rule 15(6) (§21-2-1(15) (6), N.M.S.A. 1953), *Minor v. Homestake-Sapin Partners Mine*, 1961, 69 N.M. 72, 364 P.2d 134, and *we will not disturb the findings of the trial court where the rule is not observed.*" (Emphasis added)

For the reason stated, based upon New Mexico law, the trial court's findings were conclusive and could not be reviewed by the New Mexico Supreme Court. Those findings were that all of northern Catron County was one field or territory and that Mountain States was first to occupy that territory.

The applicable law is stated by Suburban at page 22 of the Jurisdictional Statement:

> "It is an elementary principle of both public utility law and constitutional law, as well as the statutory mandate of N.M.S.A., 1953, § 69-8-1, that the first or existing public utility in the 'field' is entitled to protection from a second utility taking or destroying the prior entrant's property (1) unless the public convenience and necessity require additional service and (2) unless the prior entrant is unable to furnish such additional service."

The Supreme Court's function was simply to apply the law to the facts found by the trial court. This the Court did by granting to Mountain States an injunction based upon its prior occupation of the field or territory.

Further, the New Mexico Supreme Court had no obligation to consider any supposed constitutional questions in view of the failure of Suburban to properly plead or raise these questions (N.M.S.A., 1953, Sec. 21-2-1(20) (2)), and the U.S. Supreme Court has said:

> "(W)e do not have revisory power over state practice, provided such practice is not used to evade constitutional guaranties." *Milk Wagon Drivers Union of Chicago, Local 753, v. Meadowmoor Dairies, Inc.*, 312 U.S. 287 at 296 (1941)

CONCLUSION

The appeal is not within this Court's jurisdiction. The federal questions sought to be presented were not timely raised or expressly passed on in the state court's, nor are they substantial. Finally, the state court's judgment rests upon an adequate non-federal basis. It is respectfully submitted that for all of these reasons the appeal should be dismissed.

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No. 800

IN THE

Supreme Court of the United States

OCTOBER TERM, 1963

SUBURBAN TELEPHONE CO., a corporation,
Appellant

vs.

THE MOUNTAIN STATES TELEPHONE AND TELEGRAPH COMPANY, a corporation, et al.,
Appellee

and

MRS. JOE TADLOCK, et al.,
Appellees.

ON APPEAL FROM THE SUPREME COURT OF NEW MEXICO

MOTION TO DISMISS AND BRIEF OF APPELLEES, MRS. JOE TADLOCK, ET AL., IN SUPPORT THEREOF

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Pursuant to Rule 16, Appellees Mrs. Joe Tadlock, et al., move to dismiss the appeal from the Final Judgment of the Supreme Court of the State of New Mexico on the following grounds:

1. The appeal is not within the jurisdiction of the Court because:

A. The appeal is not taken in conformity with the rules of this Court and specifically Rule 15 (1) (d).

B. There is no statutory basis for jurisdiction.

C. The matter has been determined by the Supreme Court of the State of New Mexico and no Federal question is involved.

2. The federal question sought to be reviewed by appellant was not timely or properly raised, properly pursued or expressly passed on in the State Courts of New Mexico.

3. The appeal does not present any substantial federal question.

4. The actions of the Appellant are such that they merely cause delay and form no basis for reversal.

STATEMENT

The Appellees herein are residents of the County of Catron and were permitted to join as intervenors in the suit between the Appellant and Appellee, Mountain States Telephone Company. The intervention was based upon the desire to obtain adequate telephone service in the area around Quemado, New Mexico and further was, in effect, a protest to the methods pursued by Suburban Telephone Company which slipped into the Quemado area in the "stealth of night". Appellees herein agree with the statement of the case, as set forth in the Motion of Mountain States Telephone and Telegraph Company, but also point out to this Court that a hearing was also held by the State Corporation Commission of New Mexico and a determination was made by the Commission in favor of Mountain States Telephone and Telegraph Company.

REASONS FOR DISMISSING THE APPEAL

I. *The Appeal is Not Within The Jurisdiction of This Court.*

A. Appellees, Mrs. Joe Tadlock, et al., adopt the points and references set forth in the Brief of Appellee, Mountain States Telephone and Telegraph Company.

II. *The Alleged Federal Questions Were Not Timely Raised, Properly Pursued, or Expressly Passed Upon.*

A. Appellees, Mrs. Joe Tadlock, et al., adopt the points and references set forth in the Brief of Appellee, Mountain States Telephone and Telegraph Company.

III. *There is No Substantial Federal Question Involved.*

A. Appellees, Mrs. Joe Tadlock, et al., adopt the points and references set forth in the Brief of Appellee, Mountain States Telephone and Telegraph Company.

IV. *The Actions of the Appellant Are Such That They Merely Cause Delay and Are Without Basis.*

Appellants have been, as heretofore stated, before the State Corporation Commission, The State District Court sitting in and for Catron County and the Supreme Court of the State of New Mexico.

As will be seen from a reading of the Transcripts and the Statement of the Case, the question was not one of a Federal nature and further as set forth in Appellant's Brief on Page 8 and

(R 795-6) the main purpose is to obtain large line haul charges against Mountain States Telephone and Telegraph Company, but not for the purpose of service to the community.

Appellee submits that the entire matter has been in turmoil for two and a half years and should be dismissed and denied by this Court.

CONCLUSION

This appeal is not within the jurisdiction of this Court. No new or additional points are presented to this Court that should be passed on by this Court and further this action is submitted for the purposes of delay and there is no adequate basis for the appeal by appellant and it is therefor respectfully submitted that the appeal be dismissed and denied.

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Appellees.

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BRIEF OF APPELLANT OPPOSING MOTION TO DISMISS OF APPELLEE.

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THE SUNTHORP-WARREN PRINTING COMPANY, CHICAGO

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BRIEF OF APPELLANT OPPOSING MOTION TO DISMISS OF APPELLEE.

The appeal herein by Suburban Telephone Company (hereafter called "Suburban" or "appellant") should not be dismissed for the reasons set forth in the jurisdictional statement and for the following reasons:

I.

THE APPEAL IS WITHIN THE JURISDICTION OF THIS COURT.

The entire history of telephone service in Northern Catron County can be summarized as follows:

	Suburban	Mountain States
	Between Salt Lake and Quemado	Between Datil and Magdalena
1. Commencement of operation of private telephone line	1937 (R. 590)	1953 (R. 332, 369, 530)
2. Purchase of private line by public utility	December 19, 1960 (R. 260)	May 29, 1961 (R. 932-3)
3. Issuance of Catron County franchise	January 3, 1961 (R. 261-5)	None (R. 32)
4. Operation of former private line as a public utility	May 29, 1961 (R. 92)	July 23, 1961 (R. 93, 404)

By every test and by every comparative date, Suburban has preceded Mountain States in Northern Catron County. For any court to hold otherwise is so blatantly arbitrary that on its face it constitutes a taking of Suburban's property without due process of law under the 14th Amendment of the Federal Constitution.

From these simple and basic facts, a court could constitutionally reach only one conclusion: Suburban was the first public utility in the field or territory. If there was any "territory jumping" (Motion to Dismiss, page 21), Mountain States was guilty of it.

The appellant is not asking the Supreme Court to construe the New Mexico statutes but simply to determine whether the action of the New Mexico Supreme Court in

its application of the statutes in this case is in violation of the appellant's federal rights.

The "validity" of a state statute is sustained, within the meaning of § 1257(2), when the state court holds the statute applicable to a particular set of facts as against the contention that such an application is invalid on federal grounds.

Dahnke-Walker Milling Co. v. *Bondurant*, 257 U. S. 282.

II.

THE FEDERAL QUESTIONS WERE TIMELY RAISED.

The appellant raised constitutional questions at the trial level in its requested conclusions of law addressed to the trial judge prior to his decision (R. 89). The appellant further argued constitutional questions in its brief in the Supreme Court of New Mexico prior to that Court's decision (R. 1274-1277). The appellant devoted the major portion of its petition for rehearing to constitutional questions (R. 1386-88) and filed an exhaustive brief on the constitutional questions in support of its petition for rehearing.

Under the circumstances of this case, the appellant has raised federal questions in a timely fashion. It has raised the only federal questions which were apparent at the trial level before the trial court and the only federal questions which were apparent prior to the decision of the New Mexico Supreme Court before that Court rendered its decision. The more comprehensive consideration of the federal questions in the petition for rehearing and the brief in support thereof before the New Mexico Supreme Court were timely in view of the fact that no one anticipated until after the New Mexico Supreme Court had rendered its decision and opinion, that it would take a position

completely inconsistent with its prior decisions in the same area, or that it would, by its decision and opinion, destroy the constitutional rights of the appellant.

If federal questions are created by unexpected decision of the highest state court, giving the litigant no prior opportunity to anticipate or assert the particular federal questions, the petition for rehearing constitutes its first and probably its only chance to present the matter to that court.

Brinkerhoff-Faris Trust Co. v. *Hill*, 281 U. S. 673, 677-8.

Thus, the federal questions here were timely raised and support the exercise of Supreme Court jurisdiction. This is true even though the petition for rehearing was summarily denied without reference to the federal questions.

Great Northern R. Co. v. *Sunburst Oil Co.*, 287 U. S. 358, 366-7;

Brinkerhoff-Faris Trust Co. v. *Hill*, 281 U. S. 673, 677-8;

Ohio ex rel. Bryant v. *Akron Park District*, 281 U. S. 74, 79;

Missouri ex rel. Missouri Ins. Co. v. *Gehner*, 281 U. S. 313, 320;

Saunders v. *Shaw*, 244 U. S. 317, 320;

Cole v. *Arkansas*, 333 U. S. 196, 200.

The petition for rehearing in the New Mexico Supreme Court and the brief in support thereof have been included in the record filed with the Supreme Court in this case in order to satisfy the requirement that the record affirmatively demonstrate that a federal question was presented to and decided by the state court.

The decision of the New Mexico Supreme Court in this case, in view of the decision of the trial court refusing to

issue any injunction and in view of pertinent past decisions of the New Mexico Supreme Court, was a surprise and could not have been reasonably anticipated from prior decisions.

Herndon v. *Georgia*, 295 U. S. 441.

Under § 1257(2), an appeal will lie even though the state court is not explicit in overruling a challenge on federal grounds to the validity of the state statute.

Largent v. *Texas*, 318 U. S. 418.

As long as the statute is sustained, the court has necessarily rejected such an objection. Its silence in this respect is immaterial and cannot destroy the right to appeal under § 1257(2). Thus an erroneous failure to pass on the federal constitutional objections to the state statute is treated as equivalent to a finding of validity within the meaning of § 1257(2), so that an appeal will lie.

Lawrence v. *State Tax Commission*, 286 U. S. 276, 282-3.

III.

THERE ARE SUBSTANTIAL FEDERAL QUESTIONS.

The Supreme Court will review a state court's findings where a federal right has been denied as the result of a finding shown by the record to be without evidence to support it; or where a conclusion of law as to a federal right and a finding of fact are so intermingled as to make it necessary, in order to pass upon the federal question, to analyze the facts.

Fiske v. *Kansas*, 274 U. S. 380, 385-6;
Creswill v. *Grand Lodge*, 225 U. S. 246, 261;
Sterling v. *Constantin*, 287 U. S. 378, 398.

This Court makes an independent examination of the facts when necessary to decide whether a person has been deprived by a state court of a right secured by the federal Constitution.

Norris v. *Alabama*, 294 U. S. 587, 590;
Chambers v. *Florida*, 309 U. S. 227, 228-9;
Ashcraft v. *Tennessee*, 322 U. S. 143, 147-8;
Craig v. *Harney*, 331 U. S. 367, 373-4;
Niemotko v. *Maryland*, 340 U. S. 268, 271;
Kern-Limerick, Inc. v. *Scurlock*, 347 U. S. 110, 121;
Napue v. *Illinois*, 360 U. S. 264, 271-2.

In the latter two cases, the Court referred to "the long course of judicial construction which establishes as a principle that the duty rests on this Court to decide for itself facts or constructions upon which federal constitutional issues rest."

IV.

THE STATE COURT JUDGMENT DOES NOT REST ON ADEQUATE NON-FEDERAL GROUNDS.

The non-federal ground purported to support the state court judgment is untenable. Supreme Court review cannot be evaded by an untenable non-federal ground so unfounded that it is arbitrary and a mere device to prevent a review of the decision upon the federal question.

Enterprise Irrig. Dist. v. *Farmers' Mut. Canal Co.*, 243 U. S. 157, 164;
Ward v. *Love County*, 253 U. S. 17, 22;
Postal Tel. Cable Co. v. *Newport*, 247 U. S. 464, 475-6;
Lawrence v. *State Tax Commission*, 286 U. S. 276, 282.

This court has held that a review of federal questions may not be precluded where a rule of state pleading or procedure has been used arbitrarily.

Davis v. *Wechsler*, 263 U. S. 22, 24;
N. A. A. C. P. v. *Alabama*, 357 U. S. 449, 455-458.

CONCLUSION.

The appeal is within this Court's jurisdiction, federal questions were substantial and were timely raised, and the non-federal basis upon which the state court's judgment rests is not tenable. For these reasons and for those set forth in the jurisdictional statement, the appeal should not be dismissed.

Respectfully submitted,

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ON APPEAL FROM THE SUPREME COURT OF NEW MEXICO.

PETITION FOR REHEARING OF DISMISSAL OF APPEAL AND DENIAL OF CERTIORARI.

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ON APPEAL FROM THE SUPREME COURT OF NEW MEXICO.

PETITION FOR REHEARING OF DISMISSAL OF APPEAL AND DENIAL OF CERTIORARI.

Suburban Telephone Company prays that this Court grant rehearing of its dismissal of the appeal and denial of certiorari of March 30, 1964, and that the judgment of March 30, 1964 be vacated and the appeal reinstated or, in the alternative, that a writ of certiorari issue to review the judgment of the Supreme Court of New Mexico in the above-entitled case as prayed for in the jurisdictional statement filed herein on January 31, 1964.

REASONS FOR GRANTING REHEARING

When this Court determined that "due process is not measured by the yardstick of personal reaction or the sphygomogram of the most sensitive person, but by that whole community sense of 'decency and fairness' that has been woven by common experience into the fabric of acceptable conduct" (*Breithaupt* v. *Abram*, 352 U. S. 432, 436), it fixed a standard often difficult to find to have been breached but one which was surely violated by the judgment of the Supreme Court of New Mexico in this case. The sense of decency and fairness of the whole community is certainly shocked and shaken when an economic giant is permitted to swallow a small enterprise which by every test of law and fact has laid first claim to a territory for public service.

The equal protection clause forbids legislation in any form or judicial construction thereof by which the property of one person is, without compensation, wrested from him for the benefit of another. *Reagan* v. *Farmers Loan & Trust Co.*, 154 U. S. 362.

The fundamental reason why the wrong perpetrated by the state court is gross enough and by its nature cries loudly enough to justify constitutional remedy by this Court was early advanced in *Truax* v. *Corrigan*, 257 U. S. 312, 331-333, where this Court said:

> "The due process clause . . . tends to secure equality of law in the sense that it makes a required minimum of protection for every one's right of life, liberty and property, which the Congress or the legislature may not withhold. Our whole system of law is predicated on the general, fundamental principle of equality of application of the law . . . But the framers and adopt-

> ers of this amendment were not content to depend on a mere minimum secured by the due process clause, or upon the spirit of equality which might not be insisted on by local public opinion. They therefore adopted that spirit in a specific guaranty. The guaranty was aimed at undue favor and individual or class privilege, on the one hand, and at hostile discrimination or the oppression of inequality, on the other. It sought an equality of treatment of all persons, even though all enjoyed the protection of due process."

Substantive due process for property rights can not be so dead that it lacks even the vitality to protect against the monstrous deprivation of property without compensation and with wanton discrimination effected by the Supreme Court of New Mexico by its judgment in this case. Such a conspicuous constitutional violation creates jurisdiction in this Court.

CONCLUSION.

For the reasons set forth above and in the jurisdictional statement, it is respectfully urged that rehearing be granted and that upon such rehearing the judgment of March 30, 1964, be vacated and the appeal reinstated, or in the alternative, that a writ of certiorari issue to Supreme Court of New Mexico.

Respectfully submitted,

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CERTIFICATE OF COUNSEL.

I hereby certify that the foregoing petition for rehearing is presented in good faith and not for delay in accordance with Rule 58 of the Rules of this Court.

.....
Counsel for Appellant.